Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

LEWIS F. HUCK, Derivatively on behalf of SEA AIR SHUTTLE CORPORATION,

Petitioner,

vs.

ERIC DAWSON; ROSALIE SIMMONDS BALLENTINE; RHUDEL GEORGE; LEO FRANCIS; ROBERT O'CONNOR, JR.; WILLIAM QUETEL; GEORGE GOODWIN; LUIS SOTOMAYOR; EARL ROEBUCK, FORMER MEMBERS OF THE BOARD OF DIRECTORS; GORDON A. FINCH, FORMER EXECUTIVE DIRECTOR OF THE VIRGIN ISLANDS PORT AUTHORITY; FORMER LT. GOV. DEREK M. HODGE; ALEXANDER A. FARRELLY, FORMER GOVERNOR OF THE VIRGIN ISLANDS and VIRGIN ISLANDS PORT AUTHORITY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Will a prior court's decision denying the injured party an exclusive rights agreement, pursuant to an illegal bidding procedure, prevent Petitioner from bringing a second action, pursuant to 42 U.S.C. § 1983, against the same parties for damages sustained by the injured party subsequent to the decision in the prior lawsuit, based on the willful violation of injured party's federally granted and protected rights and privileges, not litigated in the prior lawsuit?

2. Can the doctrine of *res judicata* based on federal crimes of the individual Respondents be validly employed to deny injured party redress for the damages caused by those federal crimes?

3. Will this Court allow to stand, the decisions of the lower courts that Petitioner is liable for costs and/or attorneys' fees for seeking redress, pursuant to 42 U.S.C. § 1983, for the unlawful and willful (criminal) violation of the injured party's civil rights?

4. Will this Court allow to stand, decisions by the lower courts denying redress to injured party on *res judicata* grounds, in direct conflict with decisions by this Court on the doctrine of *res judicata*?

5. Will the Court not use its supervisory powers to deal with the judicial conduct of the lower courts hereinafter described?

6. Will this Court allow to stand, the lower court's decisions, in direct violation of this Court's dictates in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, that required the lower courts to right the wrongs done the injured party?

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STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1332, 1343 and 1391 and 42 U.S.C. § 1983.

STATUTES INVOLVED

The statutes involved are 18 U.S.C. § 241; 18 U.S.C. § 242; 28 U.S.C. § 455; 42 U.S.C. § 1983; 42 U.S.C. § 1988; and 49 U.S.C. § 1349. The text can be found in Appendix E, *infra*, pp. 64a-68a.

STATEMENT OF THE CASE

The Virgin Islands Port Authority (VIPA) owns land airports on St. Croix and St. Thomas, and seaplane airports located in downtown Charlotte Amalie and downtown Christiansted in the United States Virgin Islands, hereinafter, the Ramps. At all times pertinent, the VIPA was controlled by the individual Respondents.

Over the years the VIPA received large sums of federal funds from the DOT/FAA for aviation purposes pursuant to twenty-four (24) grant agreements [App. M, 138a]; each grant agreement required the VIPA and the individual Respondents to make all VIPA airports, land and sea, available to all certificated air

carriers, such as Sea Air Shuttle Corporation (Sea Air), on equal terms and conditions, as required by DOT/FAA regulations. [App. G, 75a].

Sea Air was issued its International Air Carrier Certificate by the DOT/FAA on March 12, 1991, certificating and authorizing Sea Air to use the VIPA's land and seaplane airports [App. F, 69a], after Sea Air sued the VIPA in "the prior lawsuit" [App. D, 36a] for a lease for the exclusive use of the Ramps, as a result of competing in a VIPA bidding procedure which, because federal funds were involved, was a totally illegal procedure.

But because the VIPA had, over the years, granted such exclusive use leases, Sea Air participated in the bidding procedure believing the VIPA had a legal right to award such a lease to the successful bidder.

At the conclusion of the illegal bidding procedure, the Respondents decided to negotiate an exclusive use lease for the Ramps with Caribbean Airboats, Inc. (CAI). CAI was not a certificated air carrier, had no application pending to become a certificated air carrier, had no seaplane planes or other aircraft, had no staff or operational personnel, and has never provided any air service to the public.

The Respondents used that decision to deprive Sea Air of its federally granted and protected right and privilege to use the Ramps on a non-exclusive basis [App. F, 69a], as Sea Air used the VIPA's land airports, when everyone involved knew that Sea Air's seaplane operation was not viable without the use of the Ramps.

The stockholders of Sea Air, Petitioner is one, spent in excess of $600,000 to obtain Sea Air's International Air Carrier Certificate (IACC) because of the necessary requirements of the DOT/FAA. Before being issued its IACC, Sea Air was

required to be fully staffed and equipped to render air service to the public.

Because Sea Air was deprived of its federally granted and protected right to use the Ramps, Sea Air was forced into liquidation in bankruptcy at the end of June, 1992, because it ran out of money after it spent in excess of $2,600,000 while it served the public from the VIPA land airports and waited in good faith to use the Ramps, as Sea Air repeatedly requested of Respondents it be allowed to do, so as to fly its "core" route, downtown Charlotte Amalie to Downtown Christiansted, where it could easily and successfully compete with air carriers using the land airports of the VIPA.

In the prior lawsuit, Sea Air sued the VIPA for the right to an exclusive use lease as the successful bidder, claiming that the VIPA was arbitrary and capricious in deciding to negotiate such a lease with CAI because CAI was not equipped to serve the public with air service, while Sea Air was soon to be granted an IACC to do so. That certificate was granted to Sea Air approximately two months after Sea Air sued the VIPA, and while the prior court was in the process of reaching its decisions.

Sea Air did not base its claim on its federally granted and protected right and privilege to use the VIPA's Ramps, just claimed it was entitled to the lease, pursuant to the bidding procedure. [App. D, 36a].

The District Court took about a year to decide that the VIPA had a proprietary right under the Virgin Islands law to negotiate an exclusive use of the Ramps lease with CAI, and therefore Sea Air was not entitled to use the Ramps, when the prior court knew federal funds were involved, as acknowledged by the District Court in dismissing subject lawsuits on *res judicata* grounds. [App. C, 31a].

The prior court had to know that because federal funds were involved, the VIPA airports, land and sea, had to be made available to all certificated air carriers such as Sea Air, on equal terms and conditions, and federal law prohibited the VIPA from having an exclusive use of the Ramps lease with CAI. [App. E, 67a]. The prior court violated Sea Air's civil rights by depriving Sea Air, under color of authority, of its federal right and privilege to use the Ramps. [App. D, 36a; App. F, 69a].

The subject lawsuits were brought by Petitioner derivatively on behalf of Sea Air because the stockholders of Sea Air refused, or were unable to finance another lawsuit, particularly one in the Virgin Islands, in order for Sea Air to be redressed for having its civil rights willfully violated by the Respondents, who continued to deprive Sea Air of its federally granted and protected right to use the Ramps, subsequent to the prior court's decision. They did so for the publicly announced reason that they wanted to protect CAI from competition by Sea Air on the routes requiring the use of the Ramps, and because the Respondents decided Sea Air was not suitable to use the Ramps, though suitable to use the VIPA's land airports, when the DOT/FAA had the exclusive right and authority to make that determination, and did so by granting Sea Air its IACC after being notified that the Respondents deemed Sea Air unsuitable to use the Ramps, as indicated in the DOT/FAA's Order of Reconsideration [App. H, 86a], finding Sea Air fit to be an air carrier.

Petitioner, on behalf of Sea Air, brought the subject lawsuits, pursuant to 42 U.S.C. § 1983 [App. E, 65a], based on the fact that the Respondents, subsequent to the prior court's decision, continued to deprive Sea Air of its federally granted and protected right and privilege to use the Ramps, which was not litigated in, or revoked by the prior court's decision, nor could it be because only the DOT/FAA has the sole right and authority to revoke or limit the federal right and privilege to use the Ramps granted

Sea Air. In the prior lawsuit Sea Air could not seek damages for its irrevocable injury that occurred subsequent to the prior court's decision, as the Respondents contended Sea Air had to do, and failing to do so barred subject lawsuits because Sea Air did not appeal the decision of the prior court.

The District Court "bought" that contention and dismissed Petitioner's lawsuits on *res judicata* grounds [App. C, 22a], and the Third Circuit Court of Appeals affirmed that decision, in direct conflict with decisions by this Court on the doctrine of *res judicata*. [App. A, 1a].

In addition, both courts found Petitioner's lawsuits frivolous, and both courts found Petitioner liable for costs and attorneys' fees [App. A, 1a; App. B, 16a], when the District Court Judge was obliged to disqualify himself since his impartiality could be reasonably questioned by any rational person, because one of the individual Respondents on behalf of himself and the other individual Respondents, testified before the United States Senate Judicial Committee to urge the confirmation of the District Court Judge to become the Chief Judge of the District Court for the Virgin Islands [App. I, 100a]. Petitioner provided the Third Circuit Court of Appeals with a copy of that testimony three months before it rendered its decision.

The Third Circuit Court of Appeals' decision made no mention of the fact that the District Court unlawfully rendered its orders and decisions, and also made no mention of this Court's decisions on the doctrine of *res judicata* set forth in Petitioner's main and reply briefs [App. K, 110a; App. L, 124a], which required the Third Circuit Court of Appeals to overturn the District Court's dismissal decision that shielded the District Court Judge's benefactors from civil liability to Sea Air for their criminal conduct in willfully violating Sea Air's civil rights, and for conspiring to injure Sea Air, since the individual Respondents

acted jointly for their own purposes in unlawfully depriving Sea Air of its federal right and privilege to use the Ramps. That the individual Respondents knew their conduct was criminal is not essential to conviction of violations of criminal civil rights statutes, 18 U.S.C. §§ 241 and 242 [App. E, 64a]; *United States v. O'Dell*, 462 F.2d 224 (1972).

There can be no possible question that Sea Air was wronged, yet both lower courts violated the dictates of this Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that required them to make good the wrongs done Sea Air, as Petitioner asserted in pleadings and briefs.

Hence this petition for a writ of certiorari so that Sea Air can be redressed, pursuant to the provisions of 42 U.S.C. § 1983 [App. E, 65a], and Petitioner be relieved of the obligation to pay substantial costs and attorneys' fees for suing on behalf of Sea Air for damages for the criminal violation of Sea Air's civil rights by the individual Respondents, and for suing Respondent VIPA for unlawfully depriving Sea Air of its federal right and privilege to use the Ramps, subsequent to the prior court's decision. The provisions of 42 U.S.C. § 1988 [App. E, 66a] encouraged Petitioner to do so.

REASONS FOR GRANTING THE WRIT

Petitioner seeks certiorari, derivatively on behalf of Sea Air Shuttle Corporation (Sea Air), because there appears to be a need for this Court to exercise its supervisory powers for reasons hereinafter set forth, and in order for this Court to overturn the decisions of the District Court that dismissed subject lawsuits on *res judicata* grounds, which decisions were affirmed by the Third Circuit Court of Appeals, in direct conflict with this Court's decision in *Lawlor v. National Screen Service Corporation, et al.*, 349 U.S. 322, 99 L. Ed. 1122, 75 S. Ct.

865 (1955), and the cases this Court cited in reaching its 8-0 decision in *Lawlor,* on the doctrine of *res judicata*, to wit: *Cromwell v. Sac County,* 94 U.S. 351, 24 L. Ed. 195 (1877); *United States v. International Bldg. Co.,* 345 U.S. 502, 97 L. Ed. 1182, 73 S. Ct. 807 (1953); and *United States v. Moser,* 266 U.S. 236, 69 L. Ed. 262, 45 S. Ct. 66 (1924).

In *Lawlor,* cited in Petitioner's main and reply briefs [App. K, 110a; App. L, 124a], this Court established beyond any possible doubt that the doctrine of *res judicata* employed by the lower courts to find subject lawsuits frivolous, could not apply to the unlawful and willful, thus criminal, conduct of the individual Respondents that occurred subsequent to the decision in the prior lawsuit, to wit, *Sea Air Shuttle Corporation v. Virgin Islands Port Authority and Caribbean Airboats, Inc.,* 800 F. Supp. 296 (D.V.I. 1992) [App. D, 36a]. That decision deprived Sea Air of its right and privilege to use, on a non-exclusive basis, the Virgin Islands Port Authority's (VIPA) seaplane airports (the Ramps) as Sea Air was specifically certificated and authorized to do by the DOT/FAA when it issued Sea Air its International Air Carrier Certificate on March 12, 1991 [App. F, 69a], thereby violating Sea Air's civil rights, because under color of authority, the court deprived Sea Air of its federally granted and protected right and privilege to use the Ramps, as did the Respondents.

Chief Justice Warren began his opinion in the *Lawlor* case by stating, "The only question presented is whether the action is barred, in the circumstances of the case, under the doctrine of *res judicata.*"

That same question is presented by the decisions of the lower courts, since Respondents continued to deprive Sea Air of its federal right and privilege to use the Ramps subsequent to the prior court's decision, as was the case in *Lawlor.*

Other quotations from Justice Warren's opinion follow:

> While the 1943 judgment (the prior court judgment) precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.

Sea Air was liquidated in bankruptcy approximately three months after the prior court's decision as a result of the unlawful and criminal conduct of the Respondents subsequent to the prior court's decision. Everyone involved knew that without the use of the Ramps, Sea Air's seaplane operation was not a viable one.

> Under these circumstances whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort, the 1943 judgment (the prior court's judgment) does not constitute a bar to the instant suit.

> Acceptance of the novel contention (that the prior court's decision "authorized" the Respondents to forever violate SEA AIR'S civil rights and barred Petitioner from forever suing for damages that occurred subsequent to the prior court's decision would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the anti-trust laws (please read the civil rights laws) nor the doctrine of *res judicata*.

> We believe that the court (the Third Circuit) erred in concluding that the 1942 (read the prior lawsuit) and the 1949 suits (read the subject cases) were based on the same cause of action.
>
> That both suits involved essentially the same course of action is not decisive. Such a course of conduct for example, an abatable nuisance may frequently give rise to more than a single course of action and, as already noted, a prior judgment is *res judicata* only as to suits involving the same course of action.

And, as hereinafter indicated, subject lawsuits were not so based.

Also see Cromwell, supra, and *Commissioner of Internal Revenue v. Joseph Sunnen,* 333 U.S. 591 (1948); *Partmar Corporation v. Paramount Pictures Theatres Corporations, et al.,* 349 U.S. 89, 98 L. Ed. 532, 74 S. Ct. 414 (1954), key decisions by this Court, where this Court in *Commissioner of Internal Revenue, supra,* held:

> . . . where a second action between the same parties is upon a different cause or demand (the subject lawsuits are a claim for damages for the unlawful and criminal violation of SEA AIR'S right and privilege to use the Ramps, subsequent to the prior court's decision, which is an entirely different cause of action from the one in the prior lawsuit where SEA AIR sought an illegal exclusive lease for the exclusive use of the Ramps) the principle of *res judicata* is applied much

> more narrowly . . . the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted upon determination of which the finding or verdict was rendered." *Cromwell v. SAC County, supra,* 94 U.S. 353, 24 L. Ed. 198.

Respondents claimed Sea Air had to have sought damages in the prior lawsuit for the violation of its civil rights that occurred subsequent to the prior court's decision, or to be forever barred from doing so because Sea Air did not appeal. Sea Air did not mention or seek damages for the willful violation of its federally granted and protected right and privilege to use the Ramps, Sea Air merely claimed it was entitled to a lease for the exclusive use of the Ramps in the prior lawsuit. [App. D, 36a].

A. The Conduct Of The Prior Court

In the prior lawsuit Judge Huyett ruled the VIPA had a proprietary right under Virgin Islands law to negotiate a lease with Caribbean Airboats, Inc. (CAI) for the exclusive use of the Ramps, thereby depriving Sea Air of its federally granted and protected right and privilege to use the Ramps, a violation of Sea Air's civil rights. CAI did not have an application pending for an air carrier certificate, nor did it have any aircraft or operating personnel, and furthermore CAI has never served the public with air service.

Judge Huyett made his decision knowing federal funds were involved. Judge Moore acknowledged that fact in his dismissal decision. [App. C, 31a]. Since federal funds were involved, both judges had to have known it was illegal for the VIPA to have a lease with CAI for the exclusive use of the Ramps.

Judge Huyett also had to have known during the year's time he took to render his decision, that when Sea Air received its International Air Carrier Certificate (IACC) [App. F, 69a], Sea Air immediately began to serve the public from the VIPA's land airports, and could not do so without a DOT/FAA issued air carrier certificate.

The lower courts "bought" the novel contention of the Respondents that the subject lawsuits were forever barred, in direct violation of this Court's holding in the 8-0 decision in *Lawlor, supra,* and the other cited decisions by this Court, *supra,* on the doctrine of *res judicata.*

All that Sea Air gave up by not appealing Judge Huyett's decision was the right to recover Sea Air's damages for the unlawful and criminal violation of Sea Air's civil rights and right and privilege to use the Ramps for the period prior to the decision in the prior lawsuit. This Court in *Lawlor* and the other decisions of this Court, *supra,* made that abundantly evident.

Only the DOT/FAA has the right and authority to determine whether Sea Air had the right and privilege to use the Ramps, both before and subsequent to the decision in the prior lawsuit. Since the DOT/FAA did not revoke that right and privilege of Sea Air, the doctrine of *res judicata* was therefore totally "misapplied" by the District Court and the Third Circuit for their own purposes, to bar Sea Air's right to redress, pursuant to the provisions of 42 U.S.C. § 1983 in direct violation of this Court's decisions on the doctrine of *res judicata, supra.*

This Court also held in *Mercoid Corp. v. Mid-Continent Investment Co.,* 320 U.S. 661, 88 L. Ed. 376, 64 S. Ct. 268 (1944) that where a second cause of action between the same parties is upon a *different claim,* the fact that it might have been asserted in a prior lawsuit, as the Respondents claimed Sea Air

had to do, does not render the judgment therein *res judicata* with respect thereto.

B. The Plain Language Of The Civil Rights Act Makes Respondents Liable To Sea Air.

42 U.S.C. § 1983 provides that if anyone acting under color of authority, as did the Respondents, deprives any citizen or other person of a federally granted right or privilege (Sea Air's federal right and privilege to use the Ramps) that person or persons is liable to the injured person in a suit at law, in equity or other proper proceeding for redress. [App. E, 65a].

This Court in *Grosjean v. American Press Co.*, 297 U.S. 233, 80 L. Ed. 660, 56 S. Ct. 444 (1936) found "or other person" in 42 U.S.C. § 1983 to include corporations.

C. Conduct Of The District Court

Yet Judge Moore ruled as indicated above, knowing no court has the right to deprive Sea Air of its right and privilege to use the Ramps because Petitioner, in his pleading, pointed out to Judge Moore that right is exclusively vested in the DOT/FAA.

Petitioner also made it abundantly evident to Judge Moore by providing a copy of a DOT/FAA letter [App. M, 138a] that indicated the VIPA received in excess of 67 million dollars of federal funds for aviation purposes from the DOT/FAA pursuant to twenty-four grant agreements. Each agreement required the VIPA to make all its airports, land and sea, available on equal terms and conditions to all certificated air carriers, such as Sea Air, as required by DOT/FAA Regulations [App. G, 75a], based on federal law, and cited in Petitioner's pleadings. Also see the disdain [App. N, 146a] the VIPA'S controllers had for those obligations.

Judge Moore also knew of the lease with CAI, in direct violation of DOT/FAA Regulations [App. G, 75a] because Petitioner made that known in Petitioner's pleadings.

Judge Moore stated in his dismissed decision that "... federal law (that) prohibited the granting of an exclusive lease totally lacks any merit and can be characterized as nothing other than frivolous."

It is indeed frightening when a federal judge finds federal law "totally lacks any merit", and that Petitioner's conduct in citing DOT/FAA Regulations based on federal law "can be characterized as nothing other than frivolous", when Petitioner did so in support of a claim for damages from the individual Respondents, pursuant to the provisions of 42 U.S.C. § 1983 [App. E, 65a], for their willful (criminal) violation of Sea Air's civil rights. It is truly alarming when a panel of three federal judges affirmed such a decision.

Judge Moore retained jurisdiction of the subject lawsuits for approximately two and a half years, knowing he was required by 28 U.S.C. § 455(a) to disqualify himself from day one, because his impartiality could be reasonably questioned. He also knew Petitioner was an old man (now Petitioner is 85 years old), and time was of the essence. After two and a half years Judge Moore erroneously dismissed subject cases on *res judicata* grounds, and ordered Petitioner to pay costs and attorneys' fees for seeking redress, pursuant to 42 U.S.C. § 1983 for Sea Air in what appears to have been a deliberate attempt by Judge Moore to shield his benefactors from civil liability to Sea Air for their criminal violation of Sea Air's civil rights, which continued to occur subsequent to the prior court's decision.

Judge Moore's impartiality could be reasonably questioned by any rational person, because one of the individual

Respondents, on behalf of himself and the other individual Respondents testified before the U.S. Senate Judiciary Committee to urge Judge Moore's confirmation. [App. I, 100a].

Petitioner learned of that testimony after Judge Moore rendered his dismissal decision. That decision and his other actions and failures to act were so contrary to the law and the facts that Petitioner hired a firm of private investigators to determine if possible, why Judge Moore acted as he did. The investigation established there was widespread media coverage of Judge Moore's appointment to be Chief Judge, and indicated that Respondent Hodge testified before the Senate Judiciary Committee to urge Judge Moore's confirmation.

Judge Moore ordered Petitioner to pay attorneys' fees, [App. B, 21a], Judge Moore found that subject lawsuits "lacked any factual or legal basis." [App. B, 20a]. It is hard to comprehend how a federal judge could make such an outlandish statement, given the facts, and the law except to try to make it appear that his benefactors were not guilty of criminally violating Sea Air's civil rights, and so that Judge Moore could shield his benefactors from civil liability to Sea Air.

D. Respondents Subject To Prosecution

The individual Respondents, for their own purposes, acted jointly to injure Sea Air, a conspiracy subjecting them to prosecution pursuant to 18 U.S.C. § 241. [App. E, 64a].

The individual Respondents also willfully violated Sea Air's civil rights, and therefore they are also subject to prosecution pursuant to 18 U.S.C. § 242. [App. E, 64a].

Proof that the Respondents actually knew that it was a constitutionally protected right and privilege that they were

violating, or were conspiring against, is not essential to conviction of violations of criminal civil rights statutes. 18 U.S.C. §§ 241 and 242 [App. E, 64a]; *United States v. O'Dell*, 462 F.2d 224 (1972).

The decisions of all three courts for one reason or another, made no mention of the federal crimes committed by the individual Respondents, and none referred these federal crimes for prosecution. [App. A, 1a; App. C, 22a; App. D, 36a]. Instead of doing so, the lower courts found Petitioner liable for costs and attorneys' fees for seeking redress for Sea Air from the individual Respondents, pursuant to 42 U.S.C. § 1983 [App. E, 65a], for the consequences of those federal crimes that occurred before and subsequent to the prior court's decision.

E. Opposing Counsel Sought Decisions By A Partial Court.

It appears to Petitioner that it is almost impossible for the Attorney General and his office that improperly represented Respondents Farrelly and Hodge, and counsel for the VIPA and the other individual Respondents not to have been aware of the fact that Judge Moore was obliged to disqualify himself. Yet they failed to join Petitioner in his request that Judge Moore transfer all three of Petitioner's cases before him to another jurisdiction so they could be decided on their merits by an impartial court even before Petitioner learned of the testimony of Respondent Hodge, thereby establishing that opposing counsel appears to have sought the advantage of a decision by a court that, under no circumstances, could be impartial.

Judge Moore refused to disqualify, at the request of Petitioner, the Attorney General's office from representing Respondents Farrelly and Hodge [App. J, 103a], sued in their individual capacities as "authorized" by *Hafer v. Melo*, 502 U.S. 21 (1991).

The first duty of the Attorney General was to the people of the Virgin Islands to ensure they were provided with the downtown air service Sea Air was certificated and authorized to render, and not to defend Respondents Farrelly and Hodge, who by their criminal actions deprived the public of the downtown air service Sea Air was ready, willing and able to provide, until it was forced into being liquidated in bankruptcy by the unlawful and criminal actions of the Respondents, three months after the prior court's decision.

It was unlawful for the Attorney General's office to be a party to the court-ordered Stipulation of Magistrate Bernard, that Judge Moore used in connection with an unexplained "Case Closed entry" in the civil rights case, to shield Respondents Farrelly and Hodge from a default judgment. Please see copy of a letter from Petitioner to Judge Moore [App. J, 103a], regarding that matter which appears to Petitioner to require this Court to exercise its supervisory powers.

F. The Conduct Of The Third Circuit Court Of Appeals

Three months before the Third Circuit Court of Appeals rendered its decision, Petitioner provided that court with a copy of Respondent Hodge's testimony before the Senate Judiciary Committee [App. I, 100a] in connection with Petitioner's petition to the Third Circuit Court to transfer to another jurisdiction *Huck v. Bryant-White and Associates,* Civil Case 0001/94 before Judge Moore in the St. Croix Division so that it can be decided on its merits by an impartial court. That petition has not as yet been acted upon.

Instead of the Third Circuit Court taking immediate disciplinary action because Judge Moore did not disqualify himself, and in violation of the Third Circuit rule that civil cases not be given preference over petitions pending before the court,

the Third Circuit affirmed Judge Moore's unlawfully rendered orders and decisions, [App. A, 1a] and found Petitioner liable for double costs and attorneys' fees because Petitioner appealed that unlawfully rendered decision by the District Court dismissing subject cases on *res judicata* grounds, in direct violation of this Court's decisions on the doctrine of *res judicata*.

In its decision, the Third Circuit Court made no mention whatsoever of the fact that Judge Moore was obliged, pursuant to 28 U.S.C. § 455(a) [App. E, 65a], to disqualify himself, and "inappropriately" made no reference, gave no weight, and showed absolutely no respect whatsoever, for this Court's decisions on the doctrine of *res judicata* set forth in Petitioner's main and reply briefs [App. K, 110a; App. L, 124a] that required the Third Circuit Court of Appeals to overturn the dismissal decision of the District Court, nor did the court respond appropriately to the arguments advanced in Petitioner's main and reply briefs [App. K, 110a; App. L, 124a] with respect to the use of the doctrine of *res judicata*. The court "improperly" elected to treat the cause of action (claim) in the prior lawsuit for an illegal lease for the exclusive use of the Ramps, pursuant to an illegal bidding procedure, as the same cause of action (claim) as in the subject lawsuits where the claim is for damages, pursuant to 42 U.S.C. § 1983, for the unlawful and willful violation of Sea Air's civil rights by the Respondents that occurred subsequent to the decision in the prior lawsuit, and elected to treat the prior court's decision as a bar to subject lawsuits, in direct conflict with *Lawlor,* and the other decision of this Court, *supra,* and by claiming Sea Air's federal right and privilege to use the Ramps was litigated in the prior lawsuit when, in fact, it was not litigated, or even mentioned, [App. D, 36a] and by using the federal crimes of conspiring to injure Sea Air, and to willfully violate Sea Air's civil rights as a valid basis for employing the doctrine of *res judicata*, when Petitioner's main brief [App. K, 116a, 119a-121a] in great detail, indicated that equitable doctrine should not be used to work an injustice, to

wit, the denial of Sea Air's right to redress for the damages caused by those federal crimes.

Further, the Third Circuit did not comply with the dictates of this Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 29 L. Ed. 619, 91 S. Ct. 1991 (1971) also set forth in Petitioner's pleadings, and main and reply briefs [App. K, 110a; App. L, 124a], that required both lower courts to right the wrongs done Sea Air, by finding Sea Air was entitled to be redressed because Sea Air was willfully deprived of its federal right and privilege to use the Ramps by the Respondents, subsequent to the prior court's decision.

G. Comments

Petitioner sincerely believes and trusts that this Court will be appalled and shocked into action by the judicial conduct as herein indicated.

Wise men have always believed that if one person's legal rights can be unlawfully invaded by government officials, with immunity, then everyone's legal rights can be unlawfully violated without legal recourse.

What is truly so frightening about the above described events is that they all actually happened.

United States courts have always appeared in the past to be alert to help "persons" when their civil rights have been violated, and particularly where they have been willfully violated. Here we have three federal courts, five federal judges and a federal magistrate who appear to have acted so as to "protect" the individual Respondents, former Virgin Islands officials who occupied the highest levels of government and who, while still in office willfully (criminally) violated Sea Air's civil rights,

and who conspired to injure Sea Air, and deprived the traveling public of downtown air service for their own purposes, and two federal courts and four federal judges who have found Petitioner is liable for costs and attorneys' fees for seeking redress for damages caused by that unlawful and criminal conduct of the Respondents.

In view of those facts, in the event certiorari is granted, it would appear to be in the best interest of justice if damages are to be awarded, and attorneys' fees become due pursuant to the provisions of 42 U.S.C. § 1988 [App. E, 66a], that the amounts be determined, including amounts for punitive damages, in other than the Third Circuit, and hopefully in the District Court for the Southern District of Texas where Petitioner is admitted to practice. Petitioner respectfully requests that this Court consider transferring the *Bryant-White* case, *supra,* to that Court, in the best interests of justice.

(1) It was just plain wrong for the prior court to deny Sea Air the federal right and privilege to use the Ramps, which was a violation of Sea Air's civil rights when, under federal law, the exclusive right and authority to determine Sea Air was "suitable" to use the Ramps and to be certificated as an air carrier was vested solely in the DOT/FAA that determined Sea Air was fit to be an air carrier.

(2) It was just plain wrong for the District Court to dismiss subject lawsuits on *res judicata* grounds and find Petitioner liable for costs and attorneys' fees when Petitioner derivatively, on behalf of Sea Air sued the Respondents for damages pursuant to 42 U.S.C. § 1983 [App. E, 65a], for their criminal violation of Sea Air's civil rights subsequent to the prior court's decision when twenty-four grant agreements required the individual Respondents and the VIPA to make all its airports, land and sea, available to all certificated air carriers, such as Sea Air, on equal

terms and conditions as required by DOT/FAA Regulations [App. G, 75a], that the District Court found "totally lacks any merit", and it was "frivolous" for Petitioner to mention, and the still further fact that 49 U.S.C. § 1349 [App. E, 67a] provides,

> There shall be no exclusive right for the use of any landing area or air navigation facility upon which federal funds have been expended,

and, the fact that the VIPA had an exclusive use of the Ramps lease with CAI, and the fact that the DOT/FAA Advisory Circular [App. G, 85a], provides in pertinent part that all applicants for federal funds for aviation purposes will be required to,

> Certify that there is no grant of an exclusive right . . . at any public airport owned or controlled by the Applicant, and . . .
>
> Give assurances that none will be granted on any airport now owned or controlled by the Applicant.

(3) It was just plain wrong for the District Court Chief Judge to retain jurisdiction of the subject lawsuits, because his impartiality could be reasonably questioned.

(4) It was just plain wrong for the Third Circuit Court to refuse to follow the dictates of this Court in the cases cited by Petitioner on the doctrine of *res judicata* set forth herein that required the Third Circuit Court of Appeals to reverse the District Court's decisions and orders.

(5) It was just plain wrong, given the facts in (4) above, for the Third Circuit to punish Petitioner for appealing the unlawfully

rendered decisions and orders of the District Court that were in conflict with this Court's decisions on the doctrine of *res judicata,* by finding Petitioner liable for double costs and attorneys' fees. [App. A, 14a].

(6) It was just plain wrong for the lower courts to refuse to redress Sea Air as required by this Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra,* requiring the lower courts to right the wrongs done Sea Air by the Respondents, as herein indicated.

(7) It was just plain wrong for the Third Circuit Court to not appropriately deal with the fact that the District Court's decisions and orders were rendered in violation of the provisions of 28 U.S.C. § 455(a).

(8) It was just plain wrong for the lower courts to "protect" the Respondents from liability for their unlawful and criminal conduct subsequent to the prior court's decision, that also deprived the public of the downtown air service in the Virgin Islands Sea Air was ready, willing and able to provide, until it was liquidated in bankruptcy due to the unlawful and criminal conduct of the Respondents.

(9) It was just plain wrong for all three courts to not refer for prosecution the federal crimes committed by the individual Respondents, as required by 18 U.S.C. § 241 for conspiring to injure Sea Air, and by § 242 for willfully violating, for their own purposes, Sea Air's civil rights. [App. E, 64a].

CONCLUSION

WHEREFORE, Petitioner very respectfully petitions this Court to grant certiorari for the reasons set forth herein, so that this Court can make right the wrongs done Sea Air and the Petitioner, as this Court proscribed in *Bivens, supra.* Otherwise the individual Respondents will walk away scott-free for the willful "murder" of Sea Air, considered a "person" by this Court in lawsuits such as the subject ones brought, pursuant to the provisions of 42 U.S.C. § 1983, and Petitioner will be obliged to pay costs and attorneys' fees for seeking redress from the Respondents in an action at law as proscribed by that statute for the willful violation of Sea Air's federal right and privilege to use the Ramps, subsequent to the prior court's decision, when Petitioner was encouraged to bring the subject lawsuits by the provisions of 42 U.S.C. § 1988. [App. E, 66a].

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 6, 1997

Lewis F. HUCK, derivatively on behalf of Sea Air Shuttle Corporation,

v.

Eric DAWSON; Rosalie Simmonds Ballentine; Rhudel George; Leo Francis; Robert O'Connor, Jr.; William Quetel; George Goodwin; Luis Sotomayor; Earl Roebuck; Members of The Board of Directors; Gordon A. Finch, Executive Director; Lt. Gov. Derek M. Hodge; Alexander A. Farrelly, Governor; Governor of the Virgin Islands,
Lewis F. HUCK, derivatively on behalf of Sea Air Shuttle Corporation,

v.

VIRGIN ISLANDS PORT AUTHORITY; Sea Air Shuttle Corporation, Appellant
Lewis F. Huck, derivatively on behalf of Sea Air Shuttle Corporation,
Appellant.

No. 96-7341
No. 96-7342
No. 96-7444.

United States Court of Appeals,
Third Circuit

Appendix A

Argued December 13, 1996.

Filed Feb. 6, 1997.

ON APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS DIVISION OF ST. THOMAS AND ST. JOHN

Lawrence E. Duffy, Esq. (Argued) Martinez-Alvarez, Fernandez-Paoli, Menendez-Monroig Centro De Seguros Building Suite 407 701 Ponce De Leon Avenue Miramar San Juan, Puerto Rico, 00907 Counsel for Appellant

Frederick G. Watts, Esq. (Argued) John H. Benham, III, Esq. Watts and Benham No. 1. Frederiksberg Gade. P.O. Box 11720 Charlotte Amalie, Saint Thomas USVI, 00801 Counsel for Appellees Dawson, Ballentine, George, Francis, O'Connor, Quetel, Goodwin, Sotomayor, Roebuck, Finch, the Virgin Islands Port Authority and Sea Air Shuttle Corporation.

Maureen P. Cormier Carol Moore Office of the Attorney General of The Virgin Island Department of Justice 48B-50 Kronprindsens Gade Charlotte Amalie, St. Thomas USVI, 00802 Counsel for Appellees Hodge and Farrelly

Before: SCIRICA, NYGAARD and McKEE, Circuit Judges

NYGAARD, Circuit Judge:

The appellant, Lewis F. Huck, suing derivatively on behalf of Sea Air Shuttle Corporation, appeals separate orders of the district court dismissing his suit and awarding costs and attorneys' fees to the appellees. Huck argues that the district

court erred first by applying the res judicata doctrine, and second, by awarding costs and attorneys' fees to the appellees. We conclude that Huck's arguments, and indeed this appeal, are frivolous and will affirm the orders of the district court.

I.

This appeals arises from the Virgin Islands Port Authority's (VIPA) refusal to allow Sea Air to use VIPA owned seaplane ramps in St. Thomas and St. Croix. As a result of Hurricane Hugo in September 1989, the seaplane service that operated between St. Croix and St. Thomas and used VIPA's seaplane ramps went out of business. In early 1990, VIPA issued a request for proposals to lease the seaplane ramps. In the course of the bidding process, VIPA considered the joint proposal of Sea Air and an affiliated company, Caribbean Airline Services, Inc. After investigating the operations of Sea Air and Caribbean, their joint proposal was rejected in favor of another bidder.

In response to being rejected, Sea Air sued VIPA and the successful bidder. In its various amended complaints, Sea Air alleged that VIPA's choice of bidders was unlawful because it violated VIPA's bidding statute; violated the due process and equal protection clauses of the Constitution; violated local and federal antitrust laws; violated Title 29, Section 543 of the V.I. Code (defining the powers of VIPA); violated the Commerce Clause; and, violated federal law under the Federal Aviation Act. The district court dismissed the antitrust claims on federal and state action immunity grounds, and the Commerce Clause and FAA claims because they were included in Sea Air's third amended complaint, filed just two weeks before trial was scheduled to begin. The district court then entered summary judgment in favor of the defendants on the balance of the claims. Significantly, Sea Air did not appeal these orders.

Later, however, Huck recycled Sea Air's claims and sued as a shareholder, derivatively on behalf of Sea Air, against VIPA and various Virgin Islands government and VIPA officials. The gravamen of his complaint was the same as that of the earlier dismissed action. Huck acknowledges the identity of the two actions, but defends his right to file the second by contending that VIPA, in continuing to deny Sea Air access to the ramps, drove his company into bankruptcy. Moreover, Huck contends that the final and unappealed judgment entered against Sea Air in the earlier case did not bar his lawsuit because the earlier decision was "fraudulently obtained," since the defendants in that action did not reveal that federal funds had been used or that federal law arguably prohibited the granting of exclusive leases for use of air navigation facilities.

The district court found Huck's claims barred by res judicata, holding that Huck's claims on behalf of Sea Air arose out of the same transaction and events that gave rise to the earlier lawsuit, and that the same had been earlier adjudicated. Huck, the court held, could not avoid the effects of res judicata simply because he was now asserting that a different degree or extent of damage than earlier alleged. The fact that he continued to suffer from the effects of the earlier judgment did not render the claims to be not fully litigated. Moreover, it concluded that the parties were in privity, a conclusion that Huck has never challenged. Further, the court found that Huck's allegations of fraud were meritless and "[could] be characterized as noting other than frivolous." Accordingly, the district court dismissed Huck's claims and entered judgment in favor of the defendants. The district court then, upon motion of the defendants and without opposition from Huck, awarded attorneys' fees to the defendants. In its memorandum explaining the award of attorneys' fees, the district court stated that Huck's lawsuits "were frivolous and groundless, lacking any factual or legal basis. . . ." Huck now appeals those orders.

Appendix A

II.

On appeal, Huck offers an array of arguments why he believes the res judicata doctrine should not have barred his claims in the district court, including: (1) his claims are for damages incurred after the first judgment, and thus constitute a different cause of action; (2) his claims were not fully litigated in the first lawsuit; (3) his claims are premised on a different set of facts; (4) his claims seek a different remedy than the claims in the first lawsuit; (5) res judicata should be used only sparingly in civil rights cases; (6) res judicata should not be applied if the first judgment was erroneous; and, (7) res judicata should not be applied where it would result in "injustice." In addition, and although he did not oppose the fee motion below, Huck now contends that the district court erred by awarding attorneys' fees to the appellees.

We have jurisdiction over these appeals under 28 U.S.C. §§ 1291, 1294(3). We review the district court's application of res judicata or bar the appellant's claims under a plenary standard. O'Leary v. Liberty Mutual Ins. Co., 923 F.2d 1062, 1064-65 (3d Cir. 1991). The district court's award of attorneys' fees to the appellees will stand "unless [the court] has erred legally, or the facts on which the determination rests are clearly erroneous." Commonwealth v. Flaherty, 40 F.3d 57, 60 (3d Cir. 1994) (citation and internal quotations omitted).

III.

In determining whether Huck's suits were barred by the res judicata doctrine (claim preclusion), we look to the law of the adjudicating state. O'Leary, 923 F.2d at 1064 (citing Gregory v. Chehi, 843 F.2d 111, 116 (3d Cir. 1988)). Absent local law or

precedent to the contrary, the Restatement (Second) of Judgments provides the applicable law. 1 V.I.C. § 4;[1] Miller v. Christian, 958 F.2d 1234, 1237 (3d Cir. 1992) (citation omitted) (applying the Restatement (Second) of Property to settle a landlord-tenant dispute).

The doctrine has been properly defined by the District Court of the Virgin Islands as "the legal principle that a final judgment, rendered upon the merits, without fraud or collusion, by a court which had jurisdiction over the parties and the subject matter, is conclusive in a subsequent action between the parties or their privies based upon the same cause of action." Julien v. Committee of Bar Examiners, 923 F.Supp. 707, 716 (D. Vi. 1996) (quoting Bank of Nova Scotia v. Bloch, 533 F.Supp. 1356, 1359 (D. Vi.) aff'd, 707 F.2d 1388 (3d Cir. 1982)). Applying this doctrine, plaintiff's claims will be barred by the application of res judicata if: (1) the earlier judgment is final and on the merits; (2) the claims asserted by the plaintiff are the same as those asserted in the earlier action; and, (3) the parties are the same as, or in privity with, the parties from the earlier action. Julien, 923 F.Supp. at 716. This interpretation is consistent with Section 24 of the Restatement (Second) of Judgments (1982) which describes the scope of res judicata as follows:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of

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1. 1 V.I.C. § 4 (1988) reads in its entirety: The rules of the common law, as expressed in restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

> merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Significantly, "it is well established that res judicata precludes a party both from relitigating matters already litigated and decided and from litigating matters that have never been litigated, yet should have been advanced in an earlier suit." Julien, 923 F.Supp. at 717-18 (citing 18 Charles A. Wright, et al., Federal Practice and Procedure § 4406 (1981)); accord Bloch, 533 F.Supp. at 1359; Lawaetz v. Bank of Nova Scotia, 23 V.I. 132, 141 (D.V.I. 1987) (citation omitted).

Here, there is no doubt that the prerequisites — finality of judgment, identity of claims, and privity of parties — are met. Huck's claims on behalf of Sea Air clearly: (1) arise out of the same transaction and events that gave rise to the earlier lawsuit; (2) mirror the claims and causes of actions asserted in the first lawsuit; and, (3) involve parties in privity. Accordingly, we find

that the district court properly applied the doctrine of res judicata to bar Huck's claims. Huck's litany of arguments to the contrary do not raise even a colorable challenge to this conclusion.

Huck's first contention is that after the district court entered its first judgment against Sea Air, VIPA continued to deny Sea Air access to the sea ramps and, as a result, Sea Air was forced to file for bankruptcy. Accordingly, Huck seeks compensation "for damages suffered subsequent to the decisions in the prior lawsuit, as a consequence of the continuing denial of access to the seaplane ramps, based on Defendants/Appellants' conduct being violative of federal law and depriving Sea Air of constitutionally protected rights." In other words, Huck asserts that the continued denial of access to the ramps, although fully in compliance with the court's judgment, creates a new cause of action for liability, and thus res judicata is inappropriate.

Huck's contention is absurd. First, Huck's argument ignores the fact that in the initial judgment the district court determined that VIPA had a right to deny Sea Air access to the sea ramps, thereby settling the question of whether Sea Air was being deprived of its constitutional rights.[2] Second, the conduct of which Huck complains, i.e., the denial of access to the sea ramps, is precisely the same conduct challenged in the earlier suit. Finally, it is difficult to understand how Huck can conclude that VIPA, by acting upon authority of and in accordance with the final judgment of the district court, created a new cause of action that was not barred by res judicata. This is not a case where there has been a change of circumstances concerning material operative facts that would serve to make the application of res

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2. We note that neither Sea Air, nor Huck, in a derivative capacity, appealed this finding.

judicata improper, nor does Huck argue so. See Restatement (Second) of Judgments § 24 comment f. Instead, he argues that the same facts that resulted in the earlier judgment have caused continued damage.

Huck's second argument against the application of res judicata is that the district court, by denying Sea Air leave to amend its complaint in the earlier action, prevented all claims from being fully litigated, and thus he should be allowed to bring those claims now. This argument was foreclosed when neither Sea Air nor Huck, derivatively, appealed the first judgment. The issues that Huck contends were not fully litigated in the earlier action — the Commerce Clause and FAA claims — could have been properly raised and litigated by Sea Air, but were not. As such, the application of res judicata to bar the assertion of those claims in this action is appropriate. Julien, 923 F.Supp. at 717-18 (citation omitted); Lawaetz, 23 V.I. at 141. Indeed, the Restatement offers a complete response to Huck's argument:

> The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action.
>
> (1) To present evidence or grounds or theories of the case not presented in the first action, or
>
> (2) To seek remedies or forms of relief not demanded in the first action.

Restatement (Second) of Judgments § 25; see also Restatement (Second) of Judgments § 25, Comment a ("The rule of § 24

puts some pressure on the plaintiff to present all his material relevant to the claim in the first action. . . . The material to be brought forward comprises, roughly, 'evidence' — connoting facts; 'grounds' — facts grouped under, a legal characterization; 'theories of the case' — premises drawn from the substantive law; 'remedies or forms of relief' — measures or kinds of recovery."). The trial court's decision to deny Sea Air's motion to amend its complaint does not change this outcome. Restatement (Second) of Judgments § 25 comment b ("It is immaterial that the plaintiff in the first action sought to prove the acts relied on in the second action and was not permitted to do so because they were not alleged in the complaint and an application to amend the complaint came too late."). Moreover, neither Sea Air nor Huck, in a derivative capacity, ever appealed the trial court's denial of the motion to amend the complaint, which would have been the proper recourse to preserve the right to litigate the claims. See, e.g., Sendi v. NCR Comten, Inc., 624 F.Supp. 1205, 1207 (E.D. Pa. 1986) (holding that "the fact that plaintiff was denied leave to amend does not give him the right to file a second lawsuit based on the same facts").[3]

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3. We note also that, despite its decision to deny Sea Air's motion to amend its complaint, the trial court's opinion clearly indicates that it was aware of the substance of the Commerce Clause and FAA claims and found them to be unpersuasive. In addition, insofar as one of the "unlitigated" claims Huck wishes to bring is for damages resulting from violations of federal law under the FAA, we note that he has no standing from which to assert this claim. Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91, 97-98 (2d Cir.) (holding that Congress created no express or implied private right of action under the Federal Aviation Act), cert. denied, 479 U.S. 872, 107 S.Ct. 248, 93 L.Ed.2d 172 (1986); accord Air Transport Ass'n v. Public Utilities Commission, 833 F.2d 200, 207-08 (9th Cir. 1987), cert. denied, 487 U.S. 1236, 108 S.Ct. 2904, 101 L.Ed.2d 936 (1988).

Huck's third argument is also frivolous. Huck maintains that since he is alleging a cause of action for harm that occurred after the first judgment, he may prove different facts, and thus res judicata is inapplicable. This, however, is an incorrect statement of the law, and, as we noted earlier, there is no merit to Huck's claim that he suffered a separate injury as the result of the continued losses from denial of access to the sea ramps. See Restatement (Second) of Judgments § 25 comment b.

The remainder of Huck's contentions are likewise without merit. Huck argues that since he is pursuing a different remedy in his action (monetary damages in contrast to the injunctive relief sought by Sea Air), res judicata cannot be applied. This assertion is again contrary to the law. Restatement (Second) of Judgments § 25 comment f ("[a]fter judgment for or against the plaintiff, the claim is ordinarily exhausted so that the plaintiff is precluded from seeking any other remedies deriving from the same grouping of facts. . . ."). In addition, Huck declares without support that res judicata should be used only sparingly in civil rights cases. He further insists that res judicata cannot be applied where "it is based on a prior decision which is clearly erroneous." These arguments amount to little more than a demand that the decision of the trial court be redecided on the merits — an option Sea Air and Huck waived when they failed to appeal the initial judgment against Sea Air. Finally, Huck maintains that res judicata should not be applied where it would result in injustice. We find no injustice when the doctrine of res judicata is properly applied to prevent appellees from being subjected to "endless relitigation of issues already decided." Bloch, 533 F.Supp. at 1359. This is especially so here, when even a cursory review of the doctrine's basic principles should have alerted counsel that Huck's derivative suit was repetitious and without colorable legal or factual support.

In summary, we find no merit to any of Huck's arguments that the district court inappropriately applied res judicata to bar his claims against the appellees. It is clear that Huck's derivative actions arose from the same core of operative facts and circumstances as the earlier Sea Air suit. It is also undisputed that there was privity between the parties in Huck's suits and the earlier Sea Air action. Given that there was an identity of facts, claims, and parties between the Sea Air suit and Huck's derivative actions we conclude that the application of res judicata to bar Huck's action was proper. Accordingly, we will affirm the district court's order granting the appellees' motions for summary judgment and dismissing Huck's suits.

IV.

Huck also challenges the order of the district court awarding costs and attorneys' fees to the appellees. At the outset, we note that Huck failed to oppose the appellees' motion for costs and attorneys' fees and thus cannot raise the issue for the first time on appeal. See Kiewit Eastern Co., Inc. v. L & R Construction Co., Inc., 44 F.3d 1194, 1203-04 (3d Cir. 1995) (affirming district court's finding that party waived right to attorneys' fees and costs because issue was not adequately raised before the court); McDonald v. McCarthy, 966 F.2d 112, 119 (3d Cir. 1992) (holding that defendants who had an opportunity to contest the accuracy and reasonableness of requested attorneys' fees, but failed to do so, waived their right to raise objections on appeal); accord Chicago v. Matchmaker Real Estate Sales Center, 982 F.2d 1086, 1101 (7th Cir. 1992) ("By challenging the attorneys' fees award for the first time on appeal, the defendants have waived the issue"), cert. denied, 508 U.S. 972, 113 S.Ct. 2961, 125 L.Ed.2d 662 (1993); accord Pope v. MCI Telecommunications Corp., 937 F.2d 258, 266-67 (5th Cir. 1991), cert. denied, 504 U.S. 916, 112 S.Ct. 1956, 118 L.Ed.2d 558 (1992). Huck has offered no explanation for his failure to oppose the appellees' motion.

Appendix A

Nothwithstanding his waiver, we will briefly consider Huck's challenges to the district court's award of attorneys' fees. Huck's first contention is that the award of attorneys' fees cannot be sustained if "the lower court erred in dismissing the suit on res judicata grounds." Since we have already held that the application of res judicata was appropriate, Huck's contention is meritless and cannot serve as the basis for reversing the award.

Huck next asserts that the award of was erroneous because the district court opinion did not explicitly find that Huck's suits were frivolous or groundless. Essentially, Huck argues that because "[t]here is only one mention of the word 'frivolous' in [the] memorandum and it is with respect to a very limited part of the cases," attorneys' fees cannot be imposed as a matter of law. Huck's contention, however, is patently wrong. The district court, in its order supporting the award of attorneys' fees, expressly found that "both of these lawsuits were frivolous and groundless, lacking any factual or legal basis. . . ." Moreover, the fact that Huck's claims were dismissed based on the application of res judicata further supports the district court's conclusion that there was no basis upon which to bring these suits and thus they were frivolous.

Finally, Huck stands logic on its head and asserts that because the claims made by Sea Air in the earlier suit were not frivolous, his reassertion of those claims in his suits cannot be considered frivolous or groundless. We infer from his argument that Huck would have this court adopt the position that once particular claims are deemed not to be frivolous, they are not, and cannot be, frivolous no matter how many times and in what context they are reasserted. As with his other "legal arguments" challenging the award of attorneys fees, Huck offers no support for his position and we find it to be without merit.

It is clear that a court may award attorneys' fees to a prevailing defendant in a civil rights action if the court finds that the action was frivolous. Flaherty, 40 F.3d at 60. Here, the district court expressly held that Huck's suits "were frivolous and groundless, lacking any factual or legal basis. . . ." Based on our review of the record and our disposition of the present appeal, we agree with the district court's assessment of the substance of Huck's actions. Accordingly, we will affirm the order of the district court awarding costs and attorneys' fees to the appellees.

V.

One final matter: we observe that the appellees have not yet sought costs or damages under Federal Rule of Appellate Procedure 38.[4] Although we do not usually raise the issue of Rule 38 damages sua sponte, and do not do so now, given our decision on the merits herein, the history of the case, and that appellees may anticipate recovering attorneys' fees herein, we feel it advisable to offer a note of instruction.

The purpose of an award of attorneys' fees under Rule 38 is "to compensate appellees who are forced to defend judgments awarded them in the trial court from appeals that are wholly without merit, and to preserve the appellate court calendar for cases worthy of consideration." Nagle v. Alspach, 8 F.3d 141, 145 (3d Cir. 1993) (citations and internal quotations omitted), cert. denied, 510 U.S. 1215, 114 S.Ct. 1337, 127 L.Ed.2d 685 (1994). We note that this appeal was wholly without merit.

4. Rule 38 reads in its entirety: If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Indeed, the district court's decision to award costs and attorneys' fees to the appellees because it found Huck's suits to be frivolous should have urged upon him and his counsel some extra caution, and given him pause to devote additional examination to the legal validity and factual merit of his contentions. Moreover, instead of producing strong legal arguments to convince us that his appeals were meritorious, Huck's counsel has offered unsupportable legal and factual conclusions and merely reargued the already-litigated claims. Hence, the predicate for an award under Rule 38 is met.

Rule 38, however, is not just a sanctions provision, arguably raising an obligation upon the court to act to protect its own integrity or that of a party. Instead, when the court determines that an appeal is frivolous, it is given the option of awarding damages upon "notice from the court," or, alternatively, awaiting a motion from the injured party. Because, however, the remedy this rule offers an injured party is more in the nature of an award upon a finding of liability in tort, we believe in this case the more sound jurisprudential approach is to stay our hand and await a request for redress, if appellees feel strongly enough, and consider themselves injured sufficiently by the action of appellant or its counsel on appeal. This permits the usual opportunities and procedures that attend a claim upon injury — i.e., demand, discussion, settlement, alternate dispute resolution, etc. — to function before we are called upon to act.

VI.

In sum, we will affirm the orders of the district court dismissing the appellant's suits and awarding costs and attorneys' fees to the appellees.

APPENDIX B — ORDER AND MEMORANDUM OF THE DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. JOHN AND ST. THOMAS ENTERED MAY 23, 1996

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. JOHN AND ST. THOMAS

Civil No. 1994-1

LEWIS F. HUCK, derivatively on behalf of SEA AIR SHUTTLE,

Plaintiff,

v.

ERIC DAWSON, ROSALIE SIMMONDS BALLENTINE, RHUDEL GEORGE, LEO FRANCIS, ROBERT O'CONNOR JR., WILLIAM QUETEL, GEORGE GOODWIN, LUIS SOTOMAYOR, EARL ROEBUCK MEMBERS OF THE BOARD OF DIRECTORS, AND GORDON A. FINCH, EXECUTIVE DIRECTOR OF THE VIRGIN ISLANDS PORT AUTHORITY; LT. GOVERNOR DEREK M. HODGE, AND ALEXANDER FARRELLY, GOVERNOR OF THE VIRGIN ISLANDS,

Defendants,

and

SEA AIR SHUTTLE CORPORATION,

Nominal Defendant.

Appendix B

Civil No. 1994-18

LEWIS F. HUCK, derivatively on behalf of SEA AIR SHUTTLE,

Plaintiff,

v.

VIRGIN ISLANDS PORT AUTHORITY,

Defendant,

and

SEA AIR SHUTTLE CORPORATION,

Nominal Defendant.

ORDER

For the reasons set forth in the accompanying memorandum, it is hereby

ORDERED that defendant Virgin Islands Port Authority is awarded $12,031.25 in attorneys' fees.

ENTERED this 23rd day of May, 1996.

For the Court

s/ TKM
Thomas K. Moore
Chief Judge

ATTEST:

Appendix B

ORINN ARNOLD
Clerk of Court

By: Frank Blackman
Deputy Clerk

cc: J. Barnard
J. Resnick
Mrs. Jackson
Fred Watts, Esq.
David Strain, Esq.
Douglas Capdeville, Esq.
Vincent Colianni, Esq. (St. Croix)
Joseph Mingolla, Esq.
Lewis F. Huck
15084 Kimberley Lane
Houston, TX 77079
NOT FOR PUBLICATION

Appendix B

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. JOHN AND ST. THOMAS

Civil No. 1994-1

LEWIS F. HUCK, derivatively on behalf of SEA AIR SHUTTLE,

Plaintiff,

v.

ERIC DAWSON, ROSALIE SIMMONDS BALLENTINE, RHUDEL GEORGE, LEO FRANCIS, ROBERT O'CONNOR JR., WILLIAM QUETEL, GEORGE GOODWIN, LUIS SOTOMAYOR, EARL ROEBUCK MEMBERS OF THE BOARD OF DIRECTORS, AND GORDON A. FINCH, EXECUTIVE DIRECTOR OF THE VIRGIN ISLANDS PORT AUTHORITY; LT. GOVERNOR DEREK M. HODGE, AND ALEXANDER FARRELLY, GOVERNOR OF THE VIRGIN ISLANDS,

Defendants,

and

SEA AIR SHUTTLE CORPORATION,

Nominal Defendant.

Civil No. 1994-18

LEWIS F. HUCK, derivatively on behalf of SEA AIR SHUTTLE,

Plaintiff,

v.

Appendix B

v.

VIRGIN ISLANDS PORT AUTHORITY,

Defendant,

and

SEA AIR SHUTTLE CORPORATION,

Nominal Defendant.

MEMORANDUM

This matter is before the Court on the motion of defendant Virgin Islands Port Authority for an award of costs attorneys fees.[1] Defendants may recover attorney's fees in suits based upon 42 U.S.C. § 1983 pursuant to 42 U.S.C. § 1988(b) if the plaintiff's claim was frivolous, unreasonable or groundless. *Roadway Express Inc. v. Piper,* 447 U.S. 752, 762 (1980); *Thorsten v. Barnard,* 883 F.2d 217, 218 (3d Cir. 1989). Plaintiff's lawsuits were ostensibly premised upon 42 U.S.C. § 1983 as that statute was cited 20 times in the complaint in Civil Number 1994-1 and two times in Civil Number 1994-18. In addition, plaintiff alleges a violation of "civil rights" 19 times in Civil Number 1994-1. The Court finds that both of these lawsuits were frivolous and groundless, lacking any factual or legal basis as noted in this Court's Memorandum dated April 8, 1996, dismissing both complaints on res judicata grounds. Accordingly, an award of fees against plaintiff is appropriate.

1. The Court treats the motion as made on behalf of Virgin Islands Port Authority, and the persons in their official capacities other than former Lt. Governor Derek M. Hodge and former Governor Alexander Farrelly, who are represented by other counsel.

Appendix B

In determining the attorney's fees to be awarded, we are guided by a number of opinions from the United States Court of Appeals for the Third Circuit. *E.g., Acosta v. Honda Motor Co.*, 717 F.2d 828, 843-44 (3d Cir. 1983); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973); *Lucerne Investment Co. v. Estate Belvedere, Inc.*, 411 F.2d 1205 (3d Cir. 1969). Generally the "lodestar" or initial valuation of an attorney's services is determined by the number of hours reasonably spent on the case multiplied by a reasonable hourly rate. The Court also evaluates the complexity or novelty of the issues presented and the quality of services performed by the attorney. *Lindy Bros.*, 487 F.2d at 168. While the issues presented in both Civil No. 1994-1 and Civil No. 1994-18 were not overly complex, the voluminous and confusing nature of the pleadings filed by plaintiff required a substantial amount of time for analysis and response. With these factors in mind, the Court reviewed the affidavit of Frederick G. Watts and the attached invoices detailing the hours spent and services performed in these cases, and concludes that 68.75 hours were reasonably spent and that the hourly rate of $175 is reasonable. A total of $12,031.25 is awarded as attorney's fees. No costs are awarded.

For the above reasons, the motion of defendant Virgin Islands Port Authority for award of attorneys' fees is granted. An appropriate order is attached.

ENTERED this 23rd day of May, 1996.

For the Court

s/ TKM
Thomas K. Moore
Chief Judge

APPENDIX C — MEMORANDUM AND ORDER OF THE DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. JOHN AND ST. THOMAS ENTERED APRIL 8, 1996

FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. JOHN AND ST. THOMAS

Civil No. 1994-1

LEWIS F. HUCK, derivatively on behalf of SEA AIR SHUTTLE,

Plaintiff,

v.

ERIC DAWSON, ROSALIE SIMMONDS BALLENTINE, RHUDEL GEORGE, LEO FRANCIS, ROBERT O'CONNOR JR., WILLIAM QUETEL, GEORGE GOODWIN, LUIS SOTOMAYOR, EARL ROEBUCK, MEMBERS OF THE BOARD OF DIRECTORS, AND GORDON A. FINCH, EXECUTIVE DIRECTOR OF THE VIRGIN ISLANDS PORT AUTHORITY; LT. GOVERNOR DEREK M. HODGE, AND ALEXANDER FARRELLY, GOVERNOR OF THE VIRGIN ISLANDS,

Defendants,

and

SEA AIR SHUTTLE CORPORATION,

Nominal Defendant.

Appendix C

Civil No. 1994-18

LEWIS F. HUCK, derivatively on behalf of SEA AIR SHUTTLE,

Plaintiff,

v.

VIRGIN ISLANDS PORT AUTHORITY,

Defendant,

and

SEA AIR SHUTTLE CORPORATION,

Nominal Defendant.

ATTORNEYS:

Joseph Mingolla, Esq.
St. Thomas, U.S.V.I.
For Lewis F. Huck and Sea Air Shuttle,

Frederick G. Watts, Esq.
Watts, Streibich & Benham
St. Thomas, U.S.V.I.
For Defendants Dawson, Ballentine, George, Francis, O'Connor, Quetel, Goodwin, Sotomayer, Roebuck, Finch and Virgin Islands Port Authority,

David B. Strain, Esq.
Department of Justice
St. Thomas, U.S.V.I.
For Defendants Farrelly and Hodge.

Appendix C

MEMORANDUM

This matter is before the Court on cross motions for summary judgment by Lewis F. Huck ["Huck"] on behalf of plaintiff Sea Air Shuttle Corporation ["plaintiff" or "Sea Air"], and by defendants Eric F. Dawson et. al. in Civil No. 1994-1, and cross motions for summary judgment by Huck on behalf of Sea Air and defendant Virgin Islands Port Authority ["VIPA"] in Civil No. 1994-18. The defendants in both cases are hereinafter referred to collectively as "defendants." Although the cases have not been formally consolidated, both cases arise from the identical set of facts. In addition, the cross motions for summary judgment in each case make identical arguments. Accordingly, this Court will dispose of both sets of cross motions in this memorandum. Upon consideration of the grounds set forth in the motions and for the reasons explained below, plaintiff's motions for summary judgment are denied, and the defendants' motions for summary judgment are granted.

Factual and Procedural Background

These cases arise out of VIPA'S refusal to allow Sea Air to use VIPA owned seaplane ramps in St. Thomas and St. Croix. As a result of Hurricane Hugo in September of 1989, the seaplane service that operated between St. Croix and St. Thomas which used VIPA's seaplane ramps went out of business, and seaplane service between the islands was interrupted. In early 1990, VIPA issued a Request for Proposals to lease the seaplane ramps. In the course of the bidding process, VIPA considered the joint proposal of Sea Air and an affiliated company, Caribbean Airline Services, Inc. ["CAS"]. After investigations were conducted into Sea Air and CAS, the joint proposal

submitted by CAS and Sea Air was rejected over that of another company, Caribbean Airboats Inc. ["CAI"].[1]

On January 23, 1991, Sea Air filed suit against VIPA and CAI ["the 1991 lawsuit].[2] In its various amended complaints, Sea Air alleged that VIPA's selection of CAI's proposal was unlawful because it violated VIPA's bidding statute, violated the due process and equal protection clauses of the Constitution, violated local and federal anti-trust laws, violated title 29, section 543 of the Virgin Islands Code (defining VIPA's powers), violated the Commerce Clause and violated federal law under the Federal Aviation Act ["FAA"]. Judge Huyett dismissed the federal and local antitrust claims on October 28, 1991 on federal and state action immunity grounds. *Sea Air v. Virgin Islands Port Authority,* 800 F.Supp. 293 (D.V.I. 1992). The FAA claim was dismissed by order dated February 26, 1992, because it was added in Sea Air's third amended complaint which was filed two weeks before trial was scheduled to begin. On March 13, 1992, the case was dismissed when Judge Huyett granted summary judgment in favor of the defendants on the remaining counts premised on VIPA's bidding statute and the U.S. Constitution. *Sea Air Shuttle Corp., d/b/a VISS and Sea Air Shuttle Corp. of the Virgin Islands v. Virgin Islands Port Authority and Caribbean Airboats, Inc.,*

1. The above facts are incorporated from the memorandum and order issued by Judge Huyett in the related prior action arising out of the same underlying situation, *Sea Air Shuttle Corporation d/b/a VISS and Sea Air Shuttle Corporation of the Virgin Islands v. The Virgin Islands Port Authority and Caribbean Airboats, Inc.,* Civil No. 1991-009 (unpublished memorandum Mar. 13, 1992).

2. The suit was originally filed in Territorial Court as Civil No. 1991-41, but was dismissed for lack of subject matter jurisdiction. (See unpublished memorandum opinion and order dated February 13, 1991, J. Cabret, attached as Exhibit B-1 to defendant's motion for summary judgment.)

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Civil No. 1991-009, (unpublished memorandum, Mar. 13, 1992) [hereinafter "unpublished memorandum"]. Sea Air did not appeal any of Judge Huyett's rulings in that case.

On January 3, 1994, Huck filed Civil No. 1994-1 as a shareholder, derivatively on behalf of Sea Air, naming various Virgin Island government and VIPA officials as defendants. Huck filed a second suit, Civil No. 1994-18, on behalf of Sea Air, on February 8, 1994, naming VIPA as a defendant. In both lawsuits Huck alleges that Sea Air was deprived of its "federally granted and constitutionally protected right to use the [VIPA owned] Ramps," when Sea Air's lease proposal was not selected in 1990. Huck alleges that because federal funds were used in the building and repairing of the sea ramps, VIPA did not have the right to deny use of the sea ramps to Sea Air under a provision of the Federal Aviation Act which states that "[t]here shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended." 49 U.S.C. § 1349 (1976). Huck alleges that the 1991 lawsuit does not bar the current lawsuits because that decision was "fraudulently obtained," because the defendants in that action did not reveal to the Court that federal funds had been utilized or that federal law arguably prohibited the granting of exclusive leases for use of air navigation facilities.

Huck moved for summary judgment on the issue of liability in Civil No. 1994-18 on March 16, 1995 and in Civil No. 1994-1 on June 5, 1995. Defendants have responded to the motions and have moved for summary judgment in their favor.

Discussion

Summary judgment is granted "if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Huck's motions for summary judgment merely consist of a recitation of the unproven allegations contained in his complaints followed by a request for judgment in his favor. Huck also attaches an affidavit from the President of Sea Air. Defendants denied the allegations in their answers to the complaints, and the affidavit does nothing to dispel the existence of genuine material factual disputes.[3] Accordingly, Huck's motions on behalf of plaintiff Sea Air for summary judgment are denied.

In their cross motions for summary judgment, defendants argue that they are entitled to judgment as a matter of law, because 1) Huck has failed to comply with Rule 23.1 of the Federal Rules of Civil Procedure, 2) the 1991 lawsuit bars plaintiff's claims under the doctrines of res judicata and issue preclusion, and 3) there is no private cause of action under the Federal Aviation Act.[4] The Court agrees that Huck's lawsuits

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3. The affidavit merely states that the affiant took certain actions in attempting to gain VIPA's approval for the use of the seaplane ramps and that those efforts were unsuccessful.

4. Defendants Dawson, Ballentine, George, Francis, O'Connor, Quetel, Goodwin, Sotomayer, Roebuck and Finch put forth these arguments in their cross motion for summary judgment in Civil No. 94-1 on July 7, 1995. The remaining defendants in Civil No. 94-1, Hodge and Farrelly, filed a separate opposition to plaintiff's motion for summary judgment and a cross motion for summary judgment on March 20, 1996. Hodge and Farrelly argue that summary judgment should be granted in their favor for the same reasons put forth by co-defendants Ballentine et. al., and incorporate by reference the arguments from their codefendants' brief. Defendant VIPA made the identical arguments for summary judgment in Civil No. 1994-18.

are barred by res judicata. Given this determination, the Court need not address defendant's alternative grounds for summary judgment.

The general rule of the doctrine of res judicata is that "a valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." RESTATEMENT (SECOND) OF JUDGMENTS § 19; *Bank of Nova Scotia v. Bloch, 19.* V.I. 45, 51 (D.C.V.I. 1982). The claim extinguished "includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." RESTATEMENT (SECOND) OF JUDGMENTS § 24(1); *see also Lawaetz v. Bank of Nova Scotia,* 23 V.I. 132, 141 (D.C.V.I. 1987) (Parties and those in privity with them are bound not only by every matter which was offered and considered in reaching that judgment, but also by every other matter which could have been offered). A lawsuit bars subsequent actions arising from the same transaction not only between the original parties, but also between any parties in privily with the original parties. WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4448 (1981); *Laweetz, 23 V.* I. at 141.

The Court finds that Huck's present claims on behalf of Sea Air arise out of the same transaction and events that gave rise to the 1991 lawsuit, and Huck has not asserted to the contrary. Huck cannot avoid the effects of res judicata simply because he asserts a different theory of relief which he alleges was not fully litigated in the prior lawsuit. For instance, Huck asserts that "the constitutionally protected right [of Sea Air] to use the Ramps was not raised, and the right of action for damages to redress the deprivation of [that right] was not an issue that the Court [in the 1991 lawsuit] could rule upon." (Civ. No. 1994-

18, First Amended Complaint at 22.) Even assuming the truth of this statement, the 1991 lawsuit still bars the claims. As the comments to section 24 make clear,

> [t]hat a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts . . . .

RESTATEMENT (SECOND) OF JUDGMENTS, § 24 *comment c.* Thus, for res judicata purposes, the claims in Civil No. 1994-1 and Civil No. 1994-18 are the same claims litigated in the 1991 lawsuit.

In addition to arising from the same transaction, there must be identity of parties or privily between parties. This requirement is satisfied in Civil No. 1994-18 because the same parties involved in the 1991 lawsuit, namely Sea Air and VIPA, are involved in Civil No. 1994-18. The addition of Huck as a representative suing derivatively on behalf of Sea Air does not alter the preclusive effect of the 1991 lawsuit. Section 59 of the Restatement provides that "[t]he judgment in an action to which the corporation is a party is binding under the rules of res judicata in a subsequent action by its stockholders or members suing derivatively in behalf of the corporation. . . ." RESTATEMENT (SECOND) OF JUDGMENTS § 59(2). Because the 1991 lawsuit would have res judicata effect upon Sea Air in any subsequent action against VIPA, the 1991 lawsuit has the same effect upon Huck suing derivatively on behalf of Sea Air.

Appendix C

The requirement of privity of parties is also met in Civil No. 1994-1. Courts find that parties are "in privity" with one another when their relationship is such that a judgment involving one of them may justly be conclusive upon the other who was not directly a party. WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4449 (1981 and 1995 Supp.) The factors to be considered in determining privity include whether the party present in the first action had the same interest as the absent party to prosecute or defend the case as vigorously. *Vas-Cath, Inc. v. Maburkar,* 745 F.Supp. 517, 531 (N.D. Ill. 1990). The defendants in Civil No. 1994-1 are various officers of VIPA and various Virgin Island government officials who Huck alleges were responsible directly or vicariously for the actions taken by VIPA in denying use of the sea ramps to Sea Air. The Court finds that VIPA had the same interest in the original action of defending its decision not to grant the lease to Sea Air as these defendants would have had. Moreover, courts have held that a government and its officers are in privity for purposes of res judicata. *E.g., Sunshine Coal Co. v. Adkins,* 310 U.S. 381, 402 (1939); *Mandarino v. Pollard,* 718 F.2d 845, 850 (7th Cir. 1983). Given that VIPA is a government instrumentality, this Court finds that the officers and-officials of VIPA, as well as the officers and officials of the Virgin Islands government, are in privity with VIPA.

Huck alleges that the 1991 lawsuit cannot have res judicata effect because it was not a valid judgment. Huck argues that "the VIPA Defendants deliberately and fraudulently did not reveal to the Court that they were obligated to make all airports, both land and sea, they controlled available to all certificated air carriers. . . ." (Civil No. 94-1, Pl's Response to Def's Cross Motion for Summ. J. at 15.) While it is true that judgments

obtained through fraud do not have res judicata effect,[5] Huck has not made any showing that fraud was at play in the 1991 action. Simply employing the term "fraudulently" throughout one's allegations does not render the actions complained of "fraudulent." Huck's argument appears to be either that the defendants "concealed" the fact that federal funds were used in connection with the sea ramps, or that the defendants "concealed" the fact that when federal funds are used, applicable federal law arguably prohibits the defendants from excluding certified air carriers from using them. This is not the type of deliberate concealment of evidence which would entitle a plaintiff to a hearing on whether the judgment should be overturned.

Huck's "fraud" allegation is essentially that Sea Air did not argue to the court in the previous lawsuit that because federal a funds were used under 49 U.S.C. § 1349, VIPA could not grant the allegedly exclusive lease to CAI. Even if that argument was not made in the 1991 lawsuit, so long as the parties had the opportunity to make such an argument, the judgment bars any new lawsuit based on the new legal argument. Moreover, it appears that it was readily apparent to Judge Huyett that federal money was used in connection with the sea ramps. (See unpublished memorandum, Mar. 13, 1992 at 25.) Similarly, the

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5. RESTATEMENT (SECOND) OF JUDGMENTS § 70 (a judgment may be avoided if the judgment was based on a claim that the party obtaining the judgment knew to be fraudulent; a party seeking relief must have acted with due diligence in discovering the facts constituting the basis for relief, assert his claim for relief from the judgment with such particularity as to indicate it is well founded and prove the allegations with clear and convincing evidence, and when his claim is based on the falsity of the evidence on which the judgment was based, show that he has made a reasonable effort in the original action to ascertain the truth of the matter.)

federal provision allegedly "concealed" by the defendants was also in fact brought to Judge Huyett's attention in the 1991 lawsuit by the Third Amended Complaint. Thus Huck's argument that the earlier judgment is invalid because defendants in the 1991 lawsuit did not concede that federal law prohibited the granting of an exclusive lease totally lacks any merit, and can be characterized as nothing other than frivolous.

Because this Court finds that the 1991 lawsuit has res judicata effect on both Civil No. 1994-1 and Civil No. 1994-018, defendants' motions for summary judgment in each case are granted, and the cases are dismissed. An appropriate order is appended.

ENTERED this 8th day of April, 1996.

For the Court

s/ TKM
Thomas K. Moore
Chief Judge

Appendix C

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. JOHN AND ST. THOMAS

Civil No. 1994-1

LEWIS F. HUCK, derivatively on behalf of SEA AIR SHUTTLE,

Plaintiff,

v.

ERIC DAWSON, ET. AL.

Defendants,

and

SEA AIR SHUTTLE CORPORATION,

Nominal Defendant.

Civil No. 1994-18

LEWIS F. HUCK, derivatively on behalf of SEA AIR SHUTTLE,

Plaintiff,

v.

VIRGIN ISLANDS PORT AUTHORITY,

Defendant,

Appendix C

and

SEA AIR SHUTTLE CORPORATION,

Nominal Defendant.

ORDER

For the reasons set forth in the accompanying memorandum, it is hereby

ORDERED that the motions for summary judgment filed by plaintiff Lewis F. Buck in Civil No. 1994-1 and Civil No. 1994-18 are DENIED, and it is further

ORDERED that the motion for summary judgment filed by defendants Eric Dawson et. al. in Civil No. 1994-1 is GRANTED, and it is further

ORDERED that the motion for summary judgment filed by defendant Virgin Islands Port Authority in Civil No. 1994-18 is GRANTED, and it is further

ORDERED that Civil No. 1994-1 and Civil No. 1994-18 are hereby DISMISSED.

ENTERED this 8th day of April 1996.

For the Court

s/ TKM
Thomas K. Moore
Chief Judge

Appendix C

ATTEST:
ORION ARNOLD
Clerk of Court

By: Tyrone Hodge, Sr.
Deputy Clerk

cc: J. Barnard
J. Resnick
Mrs. Jackson
Fred Watts, Esq.
David Strain, Esq.
Douglas Capdeville,
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Robert S. Griggs, Corporate Secretary
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Hato Rey, Puerto Rico 009171

APPENDIX D — MEMORANDUM AND ORDER OF THE DISTRICT COURT, VIRGIN ISLANDS, DIVISION OF ST. CROIX DATED MARCH 13, 1992

SEA AIR SHUTTLE CORPORATION d/b/a VISS and Sea Air Shuttle Corporation of the Virgin Islands, Plaintiffs,

v.

The VIRGIN ISLANDS PORT AUTHORITY and Caribbean Airboats, Inc.

Civ. A. No. 1991-0009.

District Court, Virgin Islands,
D. St. Croix.

March 13, 1992.

* * *

MEMORANDUM AND ORDER

HUYETT, District Judge, Sitting by Designation.

This action concerns a dispute over the purported award[1] by defendant Virgin Islands Port Authority ("VIPA") of an exclusive lease to defendant Caribbean Airboats, Inc. ("CAI") to use seaplane ramps owned by VIPA. Defendant VIPA moves for

1. Plaintiffs, Sea Air Shuttle Corporation d/b/a VISS and Sea Air Shuttle Corporation of the Virgin Islands, contend that an exclusive lease has been awarded, while defendants assert that only an opportunity to negotiate a lease has been granted. As this issue has no effect upon this decision, the Court offers no opinion on whether a lease has been awarded. For purposes of convenience in this opinion, the Court will refer to a lease as if one exists between defendants Virgin Islands Port Authority and Caribbean Airboats, Inc. This mere use of convenience in expression should not be interpreted as a conclusion that a lease in fact exists between the two defendants.

summary judgment on the three counts of the third amended complaint.[2] Plaintiffs Sea Air Shuttle Corporation and Sea Air Shuttle Corporation of the Virgin Islands (referred to collectively as "plaintiff Sea Air") oppose VIPA's motion for summary judgment and have filed a cross-motion for summary judgment. In addition, Sea Air has moved for a preliminary and permanent injunction and for summary judgment on the complaint for declaratory relief. Defendants VIPA and CAI respond to this cross-motion for summary judgment and motion for preliminary and permanent injunction by arguing that defendants are entitled to judgment as a matter of law. For the reasons stated below, I shall grant defendant VIPA's motion for summary judgment and deny plaintiff Sea Air's cross-motion for summary judgment and motion for preliminary and permanent injunction.

I. INTRODUCTION

Prior to September of 1989, when Hurricane Hugo struck the United States Virgin Islands, a seaplane service was operated by Virgin Islands Seaplane Shuttle ("VISS"). VISS provided passenger air service between downtown Christiansted, St. Croix, downtown Charlotte Amalie, St. Thomas, downtown San Juan, Puerto Rico, downtown Roadtown, Tortola, and St. John. As a

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2. By Order of October 28, 1991, the Court dismissed counts 3, 4, 5, and 6 of the second amended complaint. The remaining counts were thus counts 1 and 2 of the second amended complaint. Plaintiffs moved to amend the second amended complaint to add additional counts. *See* Plaintiffs' Motion To File Third Amended Complaint. By Order of February 26, 1992, the Court granted in part and denied in part plaintiffs' motion to file a third amended complaint. *See* Order of February 26, 1992. Pursuant to the February 26 Order, the Court accepted the pleading of all claims that had been fully briefed and rejected the amended counts asserted by plaintiffs which would require additional briefing. The third amended complaint contains three (3) counts which the Court addresses in this Memorandum and Order.

result of destruction caused by Hurricane Hugo, VISS went out of business and seaplane service between the islands was interrupted. Among the physical structures that VISS used prior to its demise were seaplane ramps on St. Thomas and St. Croix owned by VIPA.

In early 1990, VIPA issued a Request For Proposals ("RFP") to lease the seaplane ramps on St. Thomas and St. Croix. Caribbean Airline Services, Inc. ("CAS") was one of eight companies that presented a proposal to VIPA before the June 22, 1990 deadline to submit lease proposals. Sea Air did not submit a proposal. VIPA's staff reviewed the eight proposals and presented three to VIPA's Governing Board as the most viable of the eight proposals submitted. The CAS proposal was one of three that the staff of VIPA recommended to VIPA's Governing Board for additional consideration. The two other proposals recommended for further consideration were those submitted by American Aircraft Management Co. and defendant CAI. It is undisputed that VIPA's staff considered the proposal submitted by CAS to be the most viable of the three bids recommended for further consideration by VIPA's Governing Board.

On June 23, 1990, Anthony Tirri, president of CAS, and Arnaldo Deleo, president of Sea Air, entered into an oral agreement in which CAS agreed to assign its interest in the VIPA lease proposal to Sea Air. *See* Deleo Aff. at ¶ 4. On August 29, 1990, the three finalists — CAS, American Aircraft Management Co., and CAI — made presentations to the Governing Board of VIPA. CAS and Sea Air presented a proposal together and CAS submitted a written statement informing VIPA that "CAS [had] agreed to transfer its lease of the seaplane bases . . . " *See* Sea Air's Opposition to CAI's Motion to Dismiss at Exhibit A. The proposal submitted by CAS and Sea Air made clear that Sea Air

would operate the seaplane service if VIPA approved the CAS proposal. The proposal submitted by CAS and Sea Air specifically stated:

> [t]wo sister corporations have been established to operate VISS in Puerto Rico and the Virgin islands for logistical and financial reasons. SASH [Sea Air Shuttle Corporation] will operate VISS using initially Mallard aircraft leased from CAS. The new airline will operate with many ex-old VISS employees some of whom have already been employed by SASH. The organization's officers and managers will be: A. Deleo, President CEO (EAL); H. Worman, Director Maintenance (Ex VISS); J.S. Jervis, Director Flt. Operations (Ex VISS); J. Coto, Chief Pilot (Ex VISS); John Richards, Shuttle Director (Ex VISS).

Id.

The individuals representing CAS and Sea Air respectively at the August 29, 1990 meeting were Anthony Tirri, president of CAS, and Arnaldo Deleo, president of Sea Air. During the CAS/ Sea Air presentation, Mr. Tirri stated:

> As President, we [CAS] purchased the assets of V.I. Seaplane Shuttle when they went into bankruptcy for the purpose of taking over and started Sea Air International. Caribbean Airline Services will be the leasing corporation which will own and lease aircraft, the same type as previousiy used . . .

See Sea Air's Opposition to CAI's Motion to Dismiss at Exhibit

B, ¶ 10 (Minutes of the VIPA Board Meeting of August 29, 1990). In the August 29, 1990 presentation, CAS and Sea Air made clear that Sea Air would operate the seaplane service, while CAS would lease the seaplanes.

The August 29, 1990 CAS/Sea Air proposal listed the following CAS/Sea Air assets and attributes in support of the position that Sea Air represented the best of the three finalists before VIPA: (1) Sea Air's full use and control of three seaplanes with an option on a fourth seaplane; (2) Sea Air's employment of twenty-six (26) employees in anticipation of commencing seaplane service, many of whom were former non-management employees of VISS; (3) Sea Air's completion of all necessary flight training; (4) Federal Aviation Administration (FAA) approval of flight training, operations, and maintenance manuals; (5) Department of Transportation ("DOT") certification; and (6) a proposed annual fee of $150,000 for use of the seaplane ramps. In contrast, at the time of the August 29 proposal meeting, defendant CAI (1) neither owned nor leased any aircraft; (2) employed no pilots, mechanics, or other non-management personnel; (3) possessed no FAA Carrier Operating Certificate or FAA approved flight training, operations, or maintenance manuals; (4) possessed no DOT certification; and (5) proposed a smaller annual fee to lease the seaplane ramps than the fee proposed by CAS/Sea Air.

On September 10, 1990, CAS and Sea Air agreed in writing that CAS would assign its interest in the lease proposal to Sea Air.[3] The September 10, 1990 stockholders' agreement entered into by Sea Air Shuttle Corporation, CAS, Anthony C. Tirri, Salvatore J. Labate, Arnaldo Deleo and other Sea Air Shuttle

3. This written agreement ("the stockholders' agreement") between CAS and Sea Air confirmed the oral understanding reached by Tirri and Deleo on June 23, 1990.

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Corporation investors ("the stockholders' agreement") provided that CAS would transfer all of its rights in the seaplane ramp bid or lease to Sea Air Shuttle Corporation of the Virgin Islands *in the event* that the CAS bid was accepted by VIPA. *See* Sea Air's Opposition to CAI's Motion to Dismiss at Exhibit C.

By letter of October 4, 1990, Robert S. Griggs, counsel for Sea Air, informed Eric Dawson, Commissioner of VIPA, that the stockholders' agreement had been signed and that the agreement's assignment provisions were contingent on VIPA's acceptance of the CAS proposal. The October 4 letter included, *inter alia*, (1) a request that VIPA treat the CAS proposal as a Sea Air proposal; and (2) information requested by VIPA regarding Sea Air shareholders. The letter listed Sea Air Shuttle Corporation of the Virgin Islands' shareholders as Arnaldo Deleo, Roland H. Moore, Robert S. Griggs, Betty F. Griggs, Peter Nelson, Lewis F. Huck, Virginia Huck, Irene Cerqueira, Anthony C. Tirri, and Salvatore J. Labate. Also, the October 4 letter represented that Sea Air Shuttle Corporation of the Virgin Islands and Sea Air Shuttle Corporation possessed the same shareholders. Finally, the October 4 letter stated that Anthony C. Tirri was the sole shareholder of CAS.

On November 26, 1990, pursuant to a request by VIPA, Sea Air ratified CAS' June 18 proposal to lease the seaplane ramps. At no time did VIPA explicitly affirm or reject the validity of the purported assignment made by CAS to Sea Air or the acceptability to VIPA of the arrangement contemplated by CAS and Sea Air. VIPA made clear through its conduct, however, that it intended to consider the CAS/ Sea Air proposal on the terms contemplated by CAS and Sea Air.

After reviewing the August 29, 1990 oral presentations of

the three finalists — CAS/Sea Air, American Aircraft Management Company, and defendant CAI-VIPA's Governing Board requested that the Virgin Islands Department of Justice conduct a background investigation of the principals of the three companies being considered as lessees of the seaplane ramps.[4] On November 28, 1990, VIPA's Governing Board voted to hold executive session to receive the investigative reports from the Department of Justice.

An investigator from the Virgin Islands Department of Justice reported to VIPA's Governing Board during this executive session. The investigator informed the Board that the president and chief executive officer of American Aircraft Management Company had recently been indicted in Arizona for depositing funds in financial institutions in violation of federal currency transaction reporting requirements. Further, the investigator reported that Anthony Tirri, CAS' president, was previously the president of another airline that had received a number of Federal Aviation Association ("FAA") citations and fines for safety violations.[5] The investigator also reported that Salvatore Labate, a principal of Sea Air until early November 1990, had been indicted but acquitted on charges of conspiring to smuggle drugs into the United States in 1976.[6] The investigator addressed the relationship between CAS and Sea Air by advising VIPA's

4. In exploring the backgrounds of the principals of the three finalists, the investigator conducted National Criminal Intelligence System checks (NCICs) through a computer link up with the Federal Bureau of Investigations. Also, the investigator conducted financial profiles on each of the principals by running a credit check on each individual. Finally, the investigator reviewed certain newspaper articles regarding the principals.

5. The investigator's report stated that Mr. Tirri was the founder of a now defunct airline which had been cited for FAA violations.

6. Also, the investigator's report raised certain questions concerning the circumstances surrounding Labate's acquittal. Further, the report stated that Mr. Labate was Mr. Tirri's uncle.

Governing Board that the leasing arrangement between CAS and the two Sea Air corporations would enable CAS to avoid any financial responsibility in the event that the service conducted by Sea Air encountered financial or cost difficulties. The investigator stated that this arrangement created a substantial risk for VIPA since CAS, the lessor of the seaplanes, would hold substantially all of the assets used by Sea Air.[7]

Prior to VIPA's November 28, 1990 meeting, CAS and Sea Air informed VIPA that Labate had relinquished any possible association with Sea Air.[8] At the time of the November 28, 1990 VIPA meeting, Tirri owned 4.5% of Sea Air's stock and represented that he was the sole shareholder of CAS. Subsequent to the November 28 meeting, Tirri relinquished any and all control over Sea Air.

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7. After a review of the assignment and leasing arrangement between CAS and Sea Air (referred to as SAS), the investigator stated: "Mr. Tirri is placing [SAS] between VIPA and his company [CAS]. If [SAS[were to get into trouble, Mr. Tirri could relinquish any and all responsibility. With [CAS] leasing all equipment to [SAS], most of the profits will go to [CAS] in leasing cost. If a problem were to arise the assets of [CAS] and Mr. Tirri would not be in danger of cost responsibility to VIPA. This looks to be the situation Guy American Airways was in when the FAA fined them $50,000 for safety violations." V.I. Department of Justice Memorandum (October 29, 1990).

8. In a memorandum prepared for VIPA, the Virgin Islands Department of Justice Investigator stated that in spite of Mr. Tirri's disclaimer about Labate's role, "there is information showing that Salvatore Labate has some interest in [CAS] and in turn would have interest in SAS and/or SAS-PR and its affiliate [SAS-VI], who would conduct the day to day operations of the seaplane shuttle." *See* V.I. Department of Justice Memorandum (October 29, 1990).

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The investigator reported that no record of FAA violations or criminal connection or activity was found with regard to the principals and officers of CAI.

After hearing the investigator's report, VIPA's Governing Board voted unanimously to negotiate for leases of the seaplane ramps with defendant CAI. VIPA's Commissioner Eric Dawson provided two reasons for VIPA's rejection of the CAS/Sea Air proposal. First, Dawson cited Mr. Tirri's involvement in FAA violations with Guy Airlines. Specifically, Dawson stated:

> [t]he Board also received information on [CAS] in which the Board was told first of all with Mr. Tirri being involved in Guy American Airways had some FAA violations. . . . Well, right there and then, is a question of safety, whether or not there would be shortcuts to maintain the airboats to the extent that we knew that it is a very difficult operation from what we've seen in previous history — [a]s a matter of fact — on that safety question, I think it can be documented going back from the days when Charlie Blair owned the sea, the gooses as they call them . . . and we've had problems with both his regime and the regime of V.I. Seaplane Shuttle."

Dawson Dep. at 88.

Second, Dawson cited Labate's indictment for drug smuggling as a reason for rejecting the CAS/Sea Air proposal. Dawson stated:

> Mr. Labate, who we learned is the uncle of Mr. Tirri, had been indicted up in New York in the Poconos for drug transaction. . . . Well, the Board is concerned. I mean first of all, we have a drug problem in and around the Virgin Islands, and someone having airplanes to his or her disposal, which we all know is one of the vehicles by which drugs are transported . . . we believed that this was not a proper party to negotiate with.

Id. at 87.

On January 23, 1991, in reaction to VIPA's choice of CAI rather than Sea Air, Sea Sir filed a complaint in the Territorial Court of the Virgin Islands against CAS and VIPA. The Territorial Court dismissed the action for lack of subject matter jurisdiction. In February of 1991, Sea Air filed the instant action.

II. DISCUSSION

A. *Standard For Summary Judgment*

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court does not resolve questions of disputed fact, but rather simply decides whether there is a genuine issue of fact which must be resolved at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

249, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986); *Ettinger v. Johnson,* 556 F.2d 692 (3d Cir. 1977). The facts must be viewed in the light most favorable to the non-moving party, and reasonable doubt as to the existence of a genuine issue of material fact is to be resolved against the moving party. *Continental Insurance Co. v. Bodie,* 681 F.2d 436, 438 (3d Cir. 1982).

In this case, both parties agree that there are no genuine issues of material fact. With respect to the pending motion for summary judgment and permanent and preliminary injunction, the Court agrees that there are no genuine issues of material fact. As discussed below, VIPA has demonstrated as a matter of law that plaintiffs' claims lack merit. Under Rule 56(c), this Court must accordingly grant summary judgment for defendants on counts I, II, and III of the third amended complaint.

B. *Allegations About Board Meeting*

1. 29 V.I.C. § 542

Plaintiff Sea Air alleges in its third amended complaint that "[u]pon information and belief the Board of V.I.P.A. was illegally constituted at all times relevant to this action in that the Board did not have the statutorily required quorum." *See* Third Amended Compliant at ¶ 21. 29 V.I.C. § 542 states:

> (a) The powers of the Authority [VIPA] shall be exercised by a Governing Board consisting of the members of the Authority acting as a board. Within one hundred and twenty (120) days after this chapter becomes effective, the Board shall meet at the call of the Governor

> and organize, elect a Chairman, Vice Chairman, and, as soon as practicable, shall appoint an Executive Director of the Authority who shall be authorized to attend all meetings of the Board but not entitled to vote.
>
> (b) *Five members of the Board shall constitute a quorum for the purpose of organizing the Authority and conducting the business therof and for all other purposes, and all action shall be taken by a vote of the majority.*

29 V.I.C. § 542.

VIPA admits that the terms of four (4) of the nine (9) members of VIPA's Governing Board had expired prior to the November 28, 1990 meeting. The remaining five (5) members of VIPA's Governing Board were, however, in good standing and all members of VIPA's Governing Board were present at the November 28, 1990 meeting. *See* Dawson Aff. at ¶ 4-7 (May 24, 1991). Sea Air has provided no evidence contradicting or challenging the affidavit of Eric Dawson, Commissioner of Economic Development and Agriculture of the Government of the Virgin islands and Chairman of the Governing Board of the Virgin Islands Port Authority.[9] There is no material issue of fact

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9. Sea Air's principle argument against summary judgment is that "[i]t is entitled to discovery before a motion for summary judgment involving factual issues is decided." *See* Sea Air's Opposition To VIPA's Motion For Summary Judgment On Second Amended Complaint at 2 (June 12, 1991). The Court has afforded Sea Air two extentions to conduct discovery since Sea Air filed this response. *See* Orders of June 3, 1991 and November 14, (Cont'd)

regarding the presence of a quorum. Therefore, summary judgment shall be entered in favor of defendant VIPA on the claim that it violated 29 V.I.C. § 542 in conducting its November 28, 1990 Governing Board meeting without a quorum. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

2. Compliance With Competitive Bidding Statute

Plaintiff Sea Air seeks to annul any lease between VIPA and CAI on the ground that VIPA failed to comply with the competitive bidding requirements set forth in 29 V.I.C. § 572. *See* Plaintiffs' Third Amended Complaint at ¶ 7. 29 V.I.C. § 572 states:

> [a]ll purchases and contracts for supplies or services, except for personal services, made by the Authority, including contracts for construction of facilities of the Authority, shall be made after advertisement for bids sufficiently in advance of opening bids for the Authority to secure appropriate notice and opportunity for competition; provided, that where the expense estimated to be necessary in connection with the purchase of work does not exceed two thousand five hundred (2,500) dollars the same work may be carried out without advertisement for bids.

(Cont'd)
1991. Despite the lengthy briefing on numerous issues before the Court, Sea Air has failed to raise an issue of fact regarding the presence of five members of VIPA at the Boad Meeting.

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> Advertisements for bids shall not be required, however when — . . . (3) *professional, financial (including financial printing) or other expert services or work are required and the Authority shall deem it best in the interest of good administration that contracts therefor be made without such advertisement* . . .

Id.

VIPA argues that the proposals for leasing the seaplane ramps were technical and professional in nature and therefore clearly exempt from the competitive bidding requirements of Section 572. Further, VIPA contends that it fully complied with the requirements of 29 V.I.C. § 572.

Professional and expert services exemptions from public bidding requirements are common and routine. *See General Engineering Corp. v. Virgin Islands Water And Power Authority,* 805 F.2d 88 (3d Cir. 1986), *citing Waste Management v. Wisconsin Solid Waste Recycling Authority,* 84 Wis.2d 462, 267 N.W.2d 659, 665 (1978). The Court concludes that the leases of the seaplane ramps qualify for the professional and expert service exemption of 29 V.I.C. § 572(3). Further, even if the leases of the seaplane ramps were subject to the competitive bidding requirements of Section 572, plaintiff Sea Air has failed to demonstrate any violation of the statutory bidding requirements. The Court therefore also concludes that VIPA complied with the requirements of 29 V.I.C. § 572.

The Third Circuit explained the rationale behind competitive bidding statutes and professional services exemptions in *General*

Engineering Corp., 805 F.2d 88 (3d Cir. 1986). Specifically, the Third Circuit stated:

> [t]he primary purpose of a competitive bidding statute is to protect against fraud, collusion, and favoritism in the issuance of public contracts. . . . There are certain types of public contracts, however, with respect to which competitive bidding might be counterproductive and therefore inappropriate. Contracts for professional services are almost universally recognized to be such an exception to the general rule. The offerors of professional services possess varying degrees of skill, and therefore the lowest bidder does not necessarily represent the best value for the public. As one court has stated; "the rationale is that the legislature must have intended to leave public bodies free to judge the professional qualifications of those who perform services requiring scientific knowledge and professional skill."

Id. at 94-95, *quoting Waste Management v. Wisconsin Solid Waste Recycling Authority,* 84 Wis.2d 462, 267 N.W.2d 659, 665 (1978).

In other words, as I stated in *Abramson v. Georgetown Consulting Group, Inc.*, 765 F.Supp. 255 (D.V.I.), *aff'd* 952 F.2d 1391 (3d Cir. 1991) "[c]ontracts for professional services are more appropriately entered into based on factors other than price. The scientific knowledge and professional skill of independent professionals is difficult to quantify." *Id.* at 262-263.

Having explained the rationale for the professional services

exemption, the Court must now determine whether the services to be provided by CAI in the instant case quality for the exemption. Plaintiff Sea Air urges the Court to view the leases of the seaplane ramps as purely a real estate transaction. This position oversimplifies the VIPA/CAI lease and ignores the principal that in deciding whether the professional service exception is fulfilled, a Court must focus on the nature of the work implicit in the proposal or bid. *See General Engineering Corp. v. Virgin Island Water And Power Authority,* 636 F.Supp. 22, 42 (D.V.I. 1985), *aff'd* 805 F.2d 88 (3d Cir. 1986); *Curtis Ambulance of Florida, Inc. v. Board of County Commissioners of the County of Shawnee, Kansas,* 811 F.2d 1371, 1379-80 (10th Cir. 1987), *quoting Marx v. Hartford Accident & Indem. Co.,* 183 Neb. 12, 157 N.W.2d 870 (1986). In this case, the work inherent in the lease of the seaplane ramps is the provision of seaplane service between the United States Virgin Islands and other islands.

The Third Circuit recognized that the professional services exception allows a public agency the discretion to avoid competitive bidding when "it is 'in the interest of good administration.' " *General Engineering Corp.,* 805 F.2d at 95 (citations omitted). Further, the Third Circuit identified the public interest in reliability as a paramount concern in allowing services of an expert nature to be contracted for without compliance with competitive bidding requirements. *Id.* Here, the services in question involved the provision of air transportation between islands by way of airplanes capable of taking off and landing on water. Certainly, interests in reliability and safety occupied a position of chief public concern. Finally, as in other cases involving the provision of expert and professional services, it is clear that the "lowest" bidder to provide seaplane services does not *a fortiori* represent the bidder capable of providing the safest

and most reliable seaplane service. Accordingly, this Court concludes that the leasing of the seaplane ramps fulfilled the professional services exception of 29 V.I.C. § 572(3). This result is supported by *Curtis Ambulance of Florida, Inc. v. Board of County Commissioners of the County of Shawnee, Kansas,* 811 F.2d 1371, 1379-80 (10th Cir. 1987) (holding that ambulance services constituted professional services exempt from a bidding statute) and *Autotote Ltd. v. New Jersey Sports and Exposition Authority,* 85 N.J. 363, 427 A.2d 55 (1981) (holding that a contract for the installation and servicing of a totalisator system which is a computer network designed to tabulate and categorize the bets made on every horse in each race involved services qualifying for professional services exception to statutory requirement for public bidding).

Even if the leases of the seaplane ramps were subject to the competitive bidding requirements of 29 V.I.C. § 572, Sea Air has failed to demonstrate any violation of the statute. In other words, given the uncontroverted facts before the Court, it is apparent that VIPA complied with the requirements of Section 572. In construing a competitive bidding statute with the same exact language as Section 572, which governed the operations of the Virgin Islands Water and Power Authority ("WAPA"), Judge O'Brien recognized that these statutory schemes allow agencies great flexibility in their actions. Specifically, Judge O'Brien wrote:

> [a]llowance for flexibility can be seen in the language of the statute under which WAPA operates. 30 V.I.C. § 116 has broad enough scope to allow WAPA to take a variety of approaches. It does not require that a bid be awarded to the lowest bidder. It does not tell

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WAPA precisely how it must act in meeting bidding requirements.

General Engineering Corp., 636 F.Supp. at 42, *aff'd* 805 F.2d 88 (1986).

Similarly, Section 572 allows VIPA flexibility in its actions and does not require that VIPA award the lease to the highest or most financially competitive bidder.

Sea Air's argument is ambiguous because Sea Air never alleges a particular or specific violation of the competitive bidding statute. In this case, VIPA issued a public Request For Proposals ("RFP") that resulted in the submission of eight lease proposals. Sea Air makes no allegation that VIPA violated Section 572 through any defect in advertising or soliciting bids. Further, it is doubtful that Sea Air occupies a position capable of challenging any defect in the public solicitation of proposals.[10] Although far from clear, Sea Air's argument appears to be that Section 572 required VIPA to award the lease of the seaplane ramps to Sea Air because Sea Air's proposal was more financially lucrative to VIPA than CAI's proposal.

On its face, this argument lacks merit. As the Court in *General Engineering Corp.* made clear, competitive bidding statutes like Section 572 do "not require that a bid be awarded to the lowest bidder." *Id.* at 42. Rather, VIPA is allowed flexibility

10. As the Sea Air proposal was considered as part of the CAS proposal and it is apparent that Sea Air possessed notice of the RFP prior to the June 22, 1990 deadline to submit proposals, Sea Air does not possess standing to question any defect in the issuance of the RFP. *See Hospital Council of Western Pennsylvania v. City of Pittsburgh*, 949 F.2d 83, 86-87 (3d Cir. 1991).

in its operations and may take a variety of approaches under the statute. *Id.* Thus, the fact that VIPA chose CAI over Sea Air does not create a violation of Section 572.

This conclusion is supported by cases upholding agency bid awards under statutory frameworks with more rigid requirements. *See West Virginia Medical Institute v. West Virginia Public Employees Insurance Board,* 180 W.Va. 697, 379 S.E.2d 501 (1989) (holding that statute which required contracts to be awarded to the *lowest responsible bidder* required subjective evaluation of quality, service, and compatibility with other programs in addition to price and stating that a contracting agency's decision deserves a presumption of correctness that can only be defeated by a showing of fraud, collusion or abuse of discretion which shocks the conscience); *King Cold Storage Warehouse, Inc. v. City of New Orleans,* 522 So.2d 169, 172 (La.Ct.App.1988) (holding that "[i]n determining what is the low bid where more than one bidder is involved the law requires the awarding of the bid to the lowest 'responsible bidder' " and "the public body with the authority to make this determination is given wide discretion . . ."); *see also Appeal of Associated Sign & Post, Inc.,* 485 N.E.2d 917 (Ind. Ct. App. 1985); *Baxter's Asphalt And Concrete, Inc. v. Dept. of Transportation,* 475 So.2d 1284 (Fla. Dist. Ct. App. 1985); *Dickinson Company, Inc. v. City of Des Moines, Iowa,* 347 N.W.2d 436 (Iowa Ct. App. 1984); *Inman's Inc. v. City of Greenfield,* 412 N.E.2d 126 (Ind. Ct. App. 1980). These cases provide further support for the conclusion that VIPA possession wide discretion in determining which bidder to choose under Section 572. The fact that the CAS/Sea Air proposal was the most financially lucrative did not create an obligation on the part of VIPA to award the lease to Sea Air. Beyond the fact that it submitted the most financially competitive proposal, Sea Air has failed to even allege any fact that would

support an inference that VIPA acted in contravention of Section 572. Thus, even if Section 572's requirements applied to VIPA's solicitation and consideration of proposals for lease of the seaplane ramps, the Court would enter summary judgment in favor of VIPA.

C. *Due Process And Equal Protection Claims.*

Plaintiff's complaint raises claims under the Fourteenth Amendment of the United States Constitution. Specifically, plaintiff Sea Air alleges that "[t]he action of Defendant V.I.P.A. in awarding the contract to Defendant CAI was based on arbitrary, capricious, unlawful and irrelevant considerations which deprived Plaintiffs of their protected rights to due process and equal protection of the law and right to a fair opportunity for competition." Plaintiffs' Third Amended Complaint at Count II, ¶ 27. Both parties agree that the test for alleged violations of due process[11] and equal protection rights is whether the questioned government action is rationally related to a legitimate state interest. *See Rogin v. Bensalem Township,* 616 F.2d 680

11. Sea Air is imprecise in its complaint and briefing in identifying the variety of alleged due process violations. "The due process clause of the fourteenth amendment gives rise to three types of claims: (1) for violations of incorporated provisions of the Bill of Rights; (2) for violations of the substantive due process clause; and (3) for violations of procedural due process." *Burch v. Apalachee Community Mental Health Services,* 804 F.2d 1549, 1552 (11th Cir. 1986), *rev'd on rehearing* 812 F.2d 1339 (11th Cir. 1987). As Sea Air has made no claim or argument sounding in the protections afforded by the Bill of Rights, the Court must determine whether Sea Air alleges violation of procedural due process or substantive due process. Plaintiff Sea Air simply alleges that its due process rights were violated by arbitrary and capricious VIPA actions. The standard of review Sea Air urges, i.e. the rational relationship test, convinces the Court that Sea Air claims violation of its substantive due process rights. *See Student Roe By Roe v.*

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(3d Cir.1980), *cert. denied* 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981) (affirming district court decision that application of local zoning ordinance to condominium project was not unconstitutional). Sea Air does not contest the legitimacy of VIPA's interest in leasing the seaplane ramps and restoring seaplane service to the United States Virgin Islands. Rather, Sea Air alleges that VIPA's action of awarding the lease to CAI was arbitrary and capricious and therefore violative of Sea Air's substantive due process and equal protection rights.

The Court agrees that the allegations in Sea Air's complaint provide no basis for applying any equal protection standard except the rational relationship test. To prevail on its equal protection claim, Sea Air must convince the Court that VIPA's selection of CAL, and not Sea Air, so lacked rationality that the action constituted a constitutionally impermissible denial of

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Commonwealth of Pennsylvania, 638 F.Supp. 929, 932-33 (E.D. Pa. 1986) (recognizing that where there is no suspect classification used or fundamental right affected, the rational relation standard is applied for purposes of both equal protection and substantive due process analysis). "Unlike procedural due process, which permits a state to deprive a person of life, liberty or property when it provides a procedural remedy, substantive due process imposes limits on what a state may do regardless of what process is provided." *Madden v. City of Meriden*, 602 F.Supp. 1160, 1166 (D. Conn. 1985). The conclusion that Sea Air raises a substantive due process, rather than a procedural due process, claim is bolstered by the fact that Sea Air has demonstrated no procedural defect in VIPA's solicitation of bids and has alleged no difference in the procedures applied to the bidders for lease of the seaplane ramps. Finally, examination of the record makes clear that no violation of procedural due process has occurred in the instant matter. *See Rogin v. Bensalem Township*, 616 F.2d 680, 694 (3d Cir.1980), *cert. denied* 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981) (articulating the balancing test and factors to be applied in evaluating procedural due process claims).

equal protection. *Rogin* at 688. In addition, the Supreme Court "now applies virtually the same standard of review under the due process clause as it does in equal protection cases involving economic classifications. The test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate state interest." *Rogin* at 689. Because the same test applies to both the alleged due process and equal protection violations, I shall address the claims together.

The facts establish that VIPA rejected Sea Air's bid because of VIPA's concerns that Sea Air was not a responsible bidder. The record developed demonstrates that VIPA possessed three concerns regarding Sea Air's operation of the seaplane service. First, VIPA was concerned that the CAS/Sea Air leasing relationship would enable the seaplane service to avoid any financial obligations to VIPA if the lease of the seaplane ramps became disadvantageous or economically burdensome. Second, VIPA was concerned that Sea Air would operate the seaplane service unsafely. Third and finally, VIPA feared that Sea Air's seaplane operations might become involved in the importation of illegal drugs.

Urban Sanitation Corp. v. City of Pell, Alabama, 662 F.Supp. 1041, 1047 (N.D. Ala. 1986) (granting defendant's motion to dismiss) held that an unsuccessful bidder's equal protection claim lacked merit where a municipality refused to award a contract to a bidder because of the municipality's perceived concern that plaintiff was not a "responsible bidder."[12] The *Urban Sanitation Corp.* court held that a perceived concern constituted a rational basis given the statutory concern that awards be to responsible

12. Under Alabama law, municipalities are required to award contracts to the lowest responsible bidder who complies with reasonable regulations prescribed before bidding. *See* Section 11-47-6(a) Code of Alabama 1975.

bidders. Here, VIPA possessed greater discretion in soliciting proposals and awarding bids, *see General Engineering Corp.*, at 805 F.2d at 95, and it follows that VIPA's perceived concerns regarding Sea Air constituted a rational basis for rejecting the Sea Air bid. This result is supported by *NKF Engineering, Inc. v. United States*, 805 F.2d 372 (Fed. Cir. 1986) (holding that decision not to award to lowest bidder based on appearance of impropriety was not irrational).

Further, as in *Urban Sanitation Corp.*, "[t]here is no evidence other than the conclusion suggestion of the plaintiff, that the decision was other than rationally based." *Id.* Given the uncontroverted facts regarding VIPA's decision, the Court concludes that VIPA's actions were rationally related to its legitimate goal of restoring reliable and safe seaplane service to the United States Virgin Islands. A district court may not substitute its judgment for an agency's, but rather may act only when the agency's decision is found to be irrational. *Coco Brothers, Inc. v. Pierce*, 741 F.2d 675 (3d Cir.1984); *Princeton Combustion Research Laboratories, Inc. v. McCarthy*, 674 F.2d 1016 (3d Cir.1982). In other words, the Court cannot substitute its judgment simply because it might have reached a different decision. VIPA's actions do not so lack rationality that they constitute impermissible denials of equal protection or due process. *See Rogin* at 688. In fact, VIPA has demonstrated that it acted rationally in refusing the Sea Air proposal. Therefore, summary judgment must be entered in favor of VIPA on Sea Air's due process and equal protection claims.

D. *Commerce Clause And Federal Aviation Act Claims.*

Sea Air's complaint also raises claims under the Commerce

Clause of the U.S. Constitution. Specifically, Sea Air alleges that "[b]y deciding to exclusively lease the seaplane ramps, defendant VIPA is regulating interstate and foreign commerce in violation of the Commerce Clause of the U.S. Constitution. By deciding to exclusively lease the seaplane ramps, defendant VIPA is discriminating against interstate and foreign commerce in violation of the Commerce Clause of the United States Constitution." *See* Sea Air's Third Amended Complaint at Count III, ¶ 3 1-33. On its face, this claim lacks merit.

When "state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce." *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 213, 103 S.Ct. 1042, 1047, 75 L.Ed.2d 1 (1983) (holding that Commerce Clause did not prevent City of Boston from giving effect to Mayor's Executive Order requiring all construction projects funded with municipal monies to be performed by a workforce at least half of whom were bona fide residents of Boston), *citing Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). "The limitations on state authority created by the Commerce Clause cannot be ascertained without reference to the relevant federal law." *Norfolk Southern Corporation v. Oberly*, 822 F.2d 388, 393 (3d Cir. 1987) (upholding Delaware's coastal zone statute which banned product transfer facilities from operating on the Delaware coast). Here, the relevant federal statute is the Federal Aviation Act ("FAA"), 49 U.S.C.App. § 1301 *et seq.* (1990), which regulates interstate air transportation. Further, under 49 U.S.C.App. § 1305(d), there is no question that the Virgin Islands is subject to the requirements of the FAA.

As VIPA's actions are specifically authorized under the FAA, there can be no question that Sea Air's Commerce Clause claim

fails. *See White*, 460 U.S. at 213, 103 S.Ct. at 1047. Here, plaintiff Sea Air bases its claim on the argument that "[t]he United States Congress has occupied the field of commerce dealing with aviation and, in particular, the field of regulation of facilities used in aviation commerce." *See* Third Amended Complaint at ¶ 33. Specifically, Sea Air relies on 49 U.S.C.App. § 1305(a)(1) which states:

> [e]xcept as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having the authority under subchapter IV of this chapter to provide air transportation.

Id.

A corollary to this federal preemption, however, is the qulification that:

> [n]othing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or political agency of two or more States as the owner and operator of an airport served by an air carrier certificated by the Board to exercise its proprietary powers and rights.

49 U.S.C.App. § 1305(b)(1).

Appendix D

In this case, VIPA possessed proprietary powers and rights under 29 V.I.C. § 543. In relevant part, 29 V.I.C. § 543 states:

> [t]he purposes of the Authority shall be to establish, acquire, construct, develop and improve, own, operate and manage any and all types of air and marine terminals; to control the harbors of the Virgin Islands other than controlling the mooring and anchoring of vessels as defined in Title 25, chapter 16, Virgin Islands Code; and to make available the benefits thereof in the widest economic manner, thereby promoting the general welfare and increasing commerce and prosperity. The Authority is granted and shall have and may exercise all rights and powers necessary or convenient for carrying out the aforesaid purposes, including but without limiting the generality of the foregoing, the following . . .

Id.

Further, 29 VI.C. § 543(6) empowers VIPA to lease property subject to the approval of Virgin Islands Legislature.

The language of 29 V.I.C. § 543 evinces a legislative intent by the Virgin Islands Legislature to empower VIPA with propritary power, including the power to lease the seaplane ramps in question. Therefore, under 49 U.S.C.App. § 1305(b), VIPA's actions were removed from the dictates of 49 U.S.C.App. § 1305(a). This result is supported by *Montauk-Caribbean*

Airways, Inc. v. Hope, 784 F.2d 91, 96-97 (2nd Cir.1980) (holding that town when exercising proprietary rights as owner and operator of an airport could not be compelled to allow airline to serve as a fixed-base operator or to lease airline equipment and services that would permit airline to operated year-round service) and *Western Air Lines, Inc. v. Port Authority New York and New Jersey,* 817 F.2d 222, 226 (2nd Cir.1987) (affirming district court's conclusion that port authority's enforcement of local perimeter rule prohibiting nonstop flights to or from airport in excess of 1500 miles was within port authority's proprietary powers under 49 U.S.C.App. § 1305).

As VIPA was acting within its proprietary powers under 29 V.I.C. § 543 and was therefore permitted to enter into an exclusive leasing arrangement under 49 U.S.C.App. § 1305, Sea Air's claim under the Commerce Clause claim fails under *White v. Massachusetts Council of Construction Employers, Inc.* 460 U.S. 204, 213, 103 S.Ct. 1042, 1047, 75 L.Ed.2d 1 (1983). Thus, the Court need not address the merits of Sea Air's Commerce Clause arguments under *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552(1986).[13]

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13. The Court further notes that plaintiff Sea Air cannot assert a separate claim that VIPA's exclusive lease violates the FAA for two reasons. First, Sea Air lacks standing to prosecute an action under the preemption provisions of the Federal Aviation Act. *See Air Transport Association of America v. Public Utilities Commission of State of California,* 883 F.2d 200, 207 (9th Cir. 1987) (holding that 49 U.S.C.App. § 1305(a) creates no private right of action). Second, VIPA's challenged actions fall within the proprietary

(Cont'd)

III. CONCLUSION

For the reasons stated above, I shall grant defendant VIPA's motion for summary judgment and deny plaintiffs' cross-motion for summary judgment and motion for preliminary and permanent injunction and summary judgment on the complaint for declaratory relief.

(Cont'd)
powers of airport operators, *see Western Air Lines, Inc. v. Port Authority New York and New Jersey,* 817 F.2d 222, 226 (2nd Cir 1987); 29 V.I.C. § 543, and therefore are exempt from the preemption provisions of § 1305(a). *See* 49 U.S.C. App. § 1305(b).

APPENDIX E — RELEVANT STATUTES

18 U.S.C. § 241

§ 241. Conspiracy against rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege, secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secure —

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 242

§ 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both; and if death results

shall be subject to imprisonment for any term of years or for life.

28 U.S.C. § 455

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Appendix E

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Appendix E

49 U.S.C. § 1349

§ 1349. Expenditure of Federal funds for certain airports and air navigation facilities; location of airports, landing areas, and missile and rocket sites

(a) No Federal funds, other than those expended under this chapter, shall be expended, other than for military purposes (whether or not in cooperation with State or other local governmental agencies), for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area, or for the acquisition, establishment, construction, maintenance, or operation of air navigation facilities thereon, except upon written recommendation and certification by the Secretary of Transportation that such landing area or facility is reasonably necessary for use in air commerce or in the interests of national defense. Any interested person may apply to the Secretary of Transportation, under regulations prescribed by him, for such recommendation and certification with respect to any landing area or air navigation facility proposed to be established, constructed, altered, repaired, maintained, or operated by, or in the interests of, such person. There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended. For purposes of the preceding sentence, the providing of services at an airport by a single fixed-based operator shall not be construed as an exclusive right if it would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and if allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport.

Appendix E

(b) In order to assure conformity to plans and policies for allocations of airspace by the Secretary of Transportation under section 1348 of this title, no military airport or landing area, or missile or rocket site shall be acquired, established, or construed, or any runway layout substantially altered, unless reasonable prior notice thereof is given the Secretary of Transportation so that he may advise with the appropriate committees of the Congress and other interested agencies as to the effects of such acquisition, establishment, construction, or alteration on the use of airspace by aircraft. In case of a disagreement between the Secretary of Transportation and the Department of Defense or the National Aeronautics and Space Administration the matter may be appealed to the President for final determination.

APPENDIX F — AIR CARRIER CERTIFICATE

US Department
of Transportation

Federal Aviation
Administration

Air Carrier Certificate

This certifies that
SEA AIR SHUTTLE CORPORATION
CARIBBEAN AIRPORT FACILITIES
2ND FLOOR, ROOM 218
LMM INTERNATIONAL AIRPORT
SAN JUAN, PUERTO RICO 00913

has met the requirements of the Federal Aviation Act of 1958, as amended, and the rules, regulations and standards prescribed thereunder for the issuance of this certificate and is hereby authorized to operate as an air carrier and conduct common carriage operations in accordance with said Act and the rules, regulations, and standards prescribed thereunder and the terms, conditions, and limitations contained in the approved operations specifications.

This certificate is not transferable and, unless sooner surrendered, suspended, or revoked, shall continue in effect indefinitely.

By Direction of the Administrator

s/ Juan E. Cruz
JUAN E. CRUZ
(Signature)

Appendix F

MANAGER, CARRIBBEAN FSDO
(Title)

SOUTHERN REGION/FSDO21
(Region/Office)

Certificate number: *VGIA206T*

Effective date: *MARCH 12, 1991*

Issued at: *5021*

Appendix F

US Department
of Transportation

Federal Aviation
Administration

Form Approved
OMB No. 2120-00028

Operations Specifications

C70. *Airports Authorized for Scheduled Operations (2/10/89).* The certificate holder is authorized to conduct scheduled passenger and cargo operations between the regular, refueling, and provisional airports specified in the following table, or in a list which is an attachment to this paragraph. If a list of authorized airports is an attachment to this paragraph, the list must contain at least the effective date of the list, the names of the airports, the three letter identifiers (if available), the types of aircraft authorized for each airport, and a notation as to whether the airport is a regular, refueling, or provisional airport. Except for alternate airports, the certificate holder shall not use any other airport in the conduct of scheduled passenger and cargo operations. The certificate holder shall maintain a list of alternate airports which can be used and shall not use any alternate airport unless it is suitable for the type of aircraft being used and the kind of operation being conducted. Note: Refueling and provisional airports are not applicable to Part 135 operations; R-Regular, F-Refueling, and P-Provisional

Appendix F

Airport Name	Ident	Airplanes Authorized	Prov. for Ident
SAN JUAN	SJU	G-73T	
ST. THOMAS	STT	G-73T	
ST. THOMAS	SPB	G-73T	
ST. CROIX	STX	G-73T	
ST. CROIX	SSB	G-73T	
ST. JOHNS	SJF	G-73T	
TORTOLA	TOV	G-73T	

1. Issued by the Federal Aviation Administration.

2. These Operations Specifications are approved by direction of the Administrator.

s/ Lee Brooks Principal Operations Inspector SO21
BROOKS, LEE

3. Date Approval is effective: *3/12/91*
Amendment No.: *ORIGINAL*

4. I hereby accept and receive the Operations Specifications in this paragraph.

s/ Arnaldo Deleo
DELEO, ARNALDO PRESIDENT Date: 3/13/91

Effective Date: 3/12/91 CERTIFICATE NO.: VGIA206T
US Department

Appendix F

US Department
of Transportation

Federal Aviation
Administration

Form Approved
OMB No. 2120-00028

Operations Specifications

B50. *Authorized Areas of En Route Operation, Limitations, and Provisions (1/11/88).* The certificate holder is authorized to conduct en route operations in the areas of en route operation specified in this paragraph. The certificate holder shall conduct all en route operations in accordance with the limitations and provisions specified in these operations specifications, including the provisions of the paragraphs referenced for each area of en route operation. The certificate holder shall not conduct any en route operation under these operations specifications unless those operations are conducted within the areas of en route operation authorized by this paragraph.

AUTHORIZED AREAS OF EN ROUTE OPERATION	LIMITATIONS, PROVISIONS, AND REFERENCE PARAGRAPHS
THE 48 CONTIGUOUS UNITED STATES AND THE DISTRICT OF COLUMBIA.	B31
THE CARIBBEAN SEA AND THE GULF OF MEXICO, EXCLUDING THE HAVANA FIR/UIR.	B31

Appendix F

THE ISLANDS OF BRITISH VIRGIN ISLANDS, TURKS AND CAICOS ISLANDS, HAITI, PUERTO RICO, ST. MAARTEN, ST. KITTS, ST. EUSTATIUS, MONTSERRAT, U.S. VIRGIN ISLANDS, ST. BARTHELEMY, DOMINCA, ST. LUCIA, GRENADA, TRINIDAD & TOBAGO, DOMINICAN REPUBLIC, ST. MARTIN, NEVIS, ANTIGUA, GUADELOUPE, MARTINIQUE, ST. VINCENT, BABADOS, ANGUILLA, IN THE ATLANTIC OCEAN. B31

1. Issued by the Federal Aviation Administration.

2. These Operations Specifications are approved by direction of the Administrator.

s/ Lee Brooks
BROOKS, LEE Principal Operations Inspector SO21

3. Rate Approval is effective: *3/12/91*
Amendment No.: *ORIGINAL*

4. I hereby accept and receive the Operations Specifications in this paragraph.

s/ Arnaldo Deleo
DELEO, ARNALDO PRESIDENT Date: 3/13/91

Effective Date: 3/12/91 CERTIFICATE NO.: VGIA206T

APPENDIX G — ADVISORY CIRCULAR

AC NO: 150/5190-2A
DATE: 4 Apr 72

ADVISORY CIRCULAR

REPRINT
INCORPORATES CHG 1

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

SUBJECT: EXCLUSIVE RIGHTS AT AIRPORTS

1. *PURPOSE.* This circular is issued to make available to public airport owners, and to other interested persons, basic information and guidance on this agency's policy regarding exclusive rights at public airports on which Federal funds, administered by the agency, have been expended.

2. *CANCELLATION.* AC 150/5190-2 dated 2 September 1966 is cancelled.

3. *CONTENT.* Included in this circular are discussions of the exclusive rights policy in general, the legislation requiring it, the history of its development and an explanation of how it applies to aeronautical activities conducted on public airports developed or improved with Federal assistance. Descriptions of some typical situations are presented to illustrate the agency's interpretation and administration of the policy. The material offered here is nonregulatory and is intended only to foster a better understanding of the exclusive rights policy by those public airport owners to whom it applies. For owners of public airports who have not received

Federal aid, this circular will illustrate how they would be affected should they seek such aid in the future. Those engaged in a commercial activity on an airport should also find this information of interest.

4. *RELATED READING MATERIAL.*

a. Policy Statement "Exclusive Rights at Airports" as published in the Federal Register (30 FR 13661), 27 October 1965.

b. FAA Advisory Circular AC 150/5190-1, Minimum Standards for Commercial Aeronautical Activities on Public Airports.

5. *LEGISLATIVE BACKGROUND.*

a. There have been statutory prohibitions against the granting of exclusive rights at an airport ever since the enactment of the Civil Aeronautics Act of 1938. Section 303 of that Act provided "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended." More recently, this identical language was incorporated in section 308(a) of the Federal Aviation Act of 1958.

b. During the course of World War II many civil airports were improved with Federal funds. This program was carried out under agreements requiring that these airports be operated "without the grant or exercise of any exclusive right for use of the airport within the meaning of section 303 of the Civil Aeronautics Act of 1938." Following World War II, a great many former military

airports were conveyed to public agencies under the provisions of the Surplus Property Act of 1944. Initially, the deeds which transferred these surplus airports included a covenant that there would be no exclusive right contrary to the provisions of section 303. Subsequently, however, in 1947, the Surplus Property Act was amended by P.L. 80-289 which defined an exclusive right, but excluded from the definition the sale of gas and oil.

c. Since 1947, the Civil Aeronautics Administration (CAA) and its successors, the Federal Aviation Agency (FAA) and the Federal Aviation Administration (FAA), administered the Federal-aid Airport Program (FAAP) under the authority of the Federal Airport Act of 1946. The Federal Airport Act of 1946 was repealed by the Airport and Airway Development Act of 1970 and under the authority of the latter Act the Airport Development Aid Program (ADAP) was formulated. In approving grants of Federal funds under these programs, the CAA, and later the FAA, always maintained that there could be no exclusive right for any aeronautical activity which involved use of the airport's landing area. The acceptance of a grant under either of these programs prohibits the granting of an exclusive right of any aeronautical activity as long as the facility is operated as an airport. In recent years, the agency has refined and clarified its policies as referenced in paragraph 4. The following paragraphs explain how this policy will be administered and how it applies to specific circumstances frequently encountered.

6. *DEFINITIONS.* For the purpose of this circular, the following definitions apply:

Appendix G

a. *Exclusive Right.* A power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right. An exclusive right may be conferred either by express agreement, by imposition of unreasonable standards or requirements, or by any other means. Such a right conferred on one or more parties but excluding others from enjoying or exercising a similar right or rights would be an exclusive right.

b. *Aeronautical Activity.* Any activity which involves, makes possible, or is required for the operation of aircraft, or which contributes to or is required for the safety of such operations.

(1) The following activities, commonly conducted on airports, are aeronautical activities within this definition; charter operations, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other included activities, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can appropriately be regarded as an "aeronautical activity."

(2) The following are examples of what are not considered aeronautical activities: ground transportation (taxis, car rentals, limousines); restaurants; barber shops; auto parking lots.

c. *Minimun Standards.* The qualifications which may be established by an airport owner as the minimun requirements to be met as a condition for the right to conduct an aeronautical activity on the airport.

d. *Federal-aid Airport Program (FAAP).* A grant-in-aid program administered by the agency under the authority of the Federal Airport Act of 1946 (49 USC-1101), as amended, to assist public agencies in the development of a nationwide system of public airports. The Federal Airport Act of 1946 was repealed by the Airport and Airway Development Act of 1970.

e. *Airport Development Aid Program (ADAP).* A grant-in-aid program administered by the FAA under the authority of the Airport and Airway Development Act of 1970 (49 USC-1701) to assist public agencies in the substantial expansion and improvement of the Nation's airport system.

7. *POLICY.* The grant of an exclusive right for the conduct of any aeronautical activity, on an airport on which Federal funds, administered by the FAA, have been expended, is regarded as contrary to the requirements of applicable laws, whether such exclusive right results from an express agreement, from the imposition of unreasonable standards or requirements, or by any other means. However, the existence of an exclusive right to sell gasoline and oil will not be considered to be in violation of section 308(a) where such right has been specifically exempted by a deed under the Surplus Property Act, except where an agreement not to grant an exclusive right for the sale of gasoline and oil is controlling. (See subparagraph b.)

a. *Agency Position.* The agency considers that the existence of an exclusive right to conduct any aeronautical activity limits the usefulness of an airport and deprives the using public of the benefits of competitive enterprise. Apart from legal considerations, the agency believes it clearly inappropriate to apply Federal funds to improvement of an airport where full realization of the benefits would be restricted by the exercise of an exclusive right to engage in aeronautical activites.

b. *Application of Law.* The exemption contained in a surplus property deed permitting the grant of an exclusive right for the sale of gas and oil does not operate to confer a positive privilege. If the airport was already obligated by a prior agreement prohibiting an exclusive right, the deed does not relieve the owner from such obligation. Conversely, where such an exemption for gas and oil is in effect, any subsequent grant of Federal funds, administered by the agency, requires the airport owner to agree not to permit the establishment of an exclusive right to engage in aeronautical acivities, including the sale of gas and oil, in the future and to terminate any existing agreement which permits such an exclusive right as soon as possible.

8. *INTERPRETATION OF POLICY.* The circumstances involved in arranging for the availability of adequate aeronautical services vary widely from airport to airport. The following material has been prepared in an effort to furnish general guidance based on experience with exclusive rights problems.

a. *Single Activity.* The presence on an airport of only one

enterprise conducting aeronautical activities does not necessarily mean that an exclusive right has been granted. If there is no intent by express agreement, by the imposition of unreasonable standards, or by other means to exclude others, the absence of a competing activity is not a violation of this policy. This sort of situation frequently arises where the market potential is insufficient to attract additional aeronautical activities. So long as the opportunity to engage in an aeronautical activity is available to those who meet reasonable and relevant standards, the fact that only one enterprise takes advantage of the opportunity does not constitute a grant of an exclusive right.

b. *Space Limitations*. The leasing of all available airport land or facilities suitable for aeronautical activities to a single enterprise will be contrued as evidence of an intent to exclude others. This presumption will not apply if it can be reasonably demonstrated that the total space leased is presently required and will be immediately used to conduct the planned activity. The amount of space leased to a single enterprise should be limited to that for which it can clearly demonstrate an actual, existing need. If additional space becomes necessary at a later date, it must be made available, not only to an incumbent enterprise, but at the same time to all qualified proponents or bidders. The advance grant of options or preferences on future sites to a single incumbent is evidence of an intent to grant an exclusive right. On the other hand, nothing in this policy should be construed as limiting the expansion of a single enterprise when it needs additional space, even though it may ultimately reach complete occupancy of all space available.

c. *Restrictions Based on Safety.* Under certain circumstances, it is sometimes necessary to deny the right to engage in an aeronautical activity at an airport for reasons of safety. Where this denial has the effect of shielding an established enterprise from competition, it should be carefully and thoroughly justified by the airport owner.

d. *Restrictions on Self-Service.* Any unreasonable restriction imposed on the owners and operators of aircraft regarding the servicing of their own aircraft and equipment may be considered as a violation of agency policy. The owner of an aircraft should be permitted to fuel, wash, repair, paint and otherwise take care of his own aircraft, provided there is no attempt to perform such services for others. Restrictions which have the effect of diverting activity of this type to a commercial enterprise amount to an exclusive right contrary to law. Local airport regulations, however, may and should impose restrictions on these activities necessary for safety, preservation of airport facilities and protection of the public interest. These might cover, for example, restrictions on the handling practices for aviation fuel and other flammable products, such as aircraft paint and thinners; requirements to keep fire lanes open; weight limitations on vehicles and aircraft to protect paving from overstresses, etc.

e. *Monopolies Beyond Control of Airport Owners.* The Federal Communications Commission, which authorizes the use of "UNICOM" frequencies for air-to-ground use at airports, will not license more than one ground station at the same airport. Although these and similar exclusive

franchises unquestionably give the recipient an advantage over competitors, they do not constitute a grant of an exclusive right contrary to agency policy. Airport owners are encouraged to obtain the UNICOM license in their own names and through droplines to make the facility available to all fixed base operators on a required basis.

9. *ENFORCEMENT.*

a. *Remedies.* At any airport where there has been a grant of an exclusive right contrary to law and this policy, that airport and any other airport owned or controlled by the offending airport owner will be ineligible for assistance under the ADAP, and the agency will not expend Facilities and Equipment funds for installations designed to benefit traffic at such airports. No grant agreement may be executed, and no payment of funds due under prior grant agreements shall be made, nor shall any Facilities and Equipment funds be expended until the exclusive right has been terminated.

b. *National Defense and National Interest.* This policy shall not be construed as precluding the grant or expenditure of Federal funds when required for the national defense, or when determined by the Administrator to be in the national interest.

c. *Application to Preexisting Agreements.* On 17 July 1962, the agency defined the aeronautical activities prohibited by section 308(a) of the Federal Aviation Act. Prior to the publication of this definition, exclusive rights to conduct certain activities not involving the actual use of public landing areas were considered not to be in

violation of the statute. Also, as noted in paragraph 7 hereof, the grant of an exclusive right to sell only gasoline and oil would not be in violation of the statute where the controlling agreement with the Government is a surplus property deed specifically exempting such sales from the activities otherwise prohibited on an exclusive basis. The agency will continue to participate in airport development in these instances if it can be demonstrated that an exclusive right agreement made prior to 17 July 1962, or pursuant to the exemption in a surplus property deed, will be effectively terminated as soon as possible. The termination date will in no event be later than the earliest renewal or cancellation date specified in the lease or agreement covering such an exclusive right agreement. However, in no case will ADAP participation in airport improvement be authorized where there exists an exclusive right which was prohibited under the interpretation prior to 17 July 1962.

10. *PROPRIETARY EXCLUSIVES.* The public agency that owns and operates a public airport may engage in any proprietary aeronautical activity and deny the same right to others without violating this policy. This means that the public agency may provide aeronautical services on an exclusive basis, but only if it does so as a principal, using its own employees and resources. This exemption is not effective where an independent commercial enterprise is designated an "agent" of the airport owner.

11. *ADMINISTRATION OF POLICY.*

a. As a material part of any grant agreement in anticipation of financial assistance under the Airport and Airway

Appendix G

Development Act, all applicants for such assistance will be required to:

(1) Certify that there is no grant of an exclusive right which would preclude expenditure of funds by the agency under applicable law and agency policy at any public airport owned or controlled by the applicant, and

(2) Give assurances that none will be granted on any airport now owned or controlled by the applicant.

b. It is the intent of this policy to promote fair competition at public airports and not to expose those who have undertaken to provide commodities and services to irresponsible competition. Prudent airport owners will adopt and enforce minimum standards to be met by those who propose to conduct a commercial aeronautical activity. Such standards, by expressing minimum levels of service that must be offered, relate primarily to the public interest, but appropriate requirements uniformly applied discourage substandard enterprises, thereby protecting both the established aeronautical activity and the airport patrons. The application of any unreasonable requirement, or standard not relevant to the proposed activity, or any requirement that is applied in a discriminatory manner shall be considered a constructive grant of an exclusive right contrary to applicable law and provisions of agency policy.

s/ Chester G. Bowers
CHESTER G. BOWERS
Director, Airports Service

APPENDIX H — ORDER ON RECONSIDERATION SERVED MARCH 5, 1991

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 4th day of March, 1991

Docket 47131

Application of

SEA AIR SHUTTLE CORPORATION
d/b/a VIRGIN ISLANDS SEAPLANE SHUTTLE

for a fitness determination, a transfer of commuter air carrier authority, and an exemption from the 45-day notice requirements of section 204.8 of the Department's regulations

ORDER ON RECONSIDERATION

Summary

Upon petition of Caribbean Airboats, Inc. (CAI), the Department has reconsidered the findings made in Order 91-2-1 concerning the fitness of Sea Air Shuttle Corporation d/b/a Virgin Islands Seaplane Shuttle (VISS). By this order, we are reaffirming those findings and our conclusion that VISS is fit, willing, and able to engage in scheduled passenger operations.

Appendix H

Background

On November 19, 1990, by Order 90-11-34, we tentatively found VISS fit to engage in scheduled commuter operations and to receive in transfer the commuter air carrier authority held by its predecessor, Virgin Islands Seaplane Shuttle, Inc.

On December 4, we received answers to the show-cause order from CAT and Aviation Associates, Inc. (AAI). CAI is a non-operating company that has been vying with VISS for (and has preliminarily won) the right to lease the seaplane ramps in downtown Christiansted, St. Croix and Charlotte Amalie, St. Thomas, from the Virgin Islands Port Authority. AAI, which formerly used the trade name Eastern Metro Express, is a commuter carrier that serves the airports on St. Thomas and St. Croix.

Both objections pointed out that VISS had been denied the right to lease the seaplane ramps, upon which the applicant's service proposal had been based. CAI concluded that VISS could no longer be considered fit based on its original operating plan, and urged that, if we let VISS revise its service proposal, we must allow the public to comment upon the changes in a new show-cause order. AAI also charged that VISS's aircraft, which had been damaged in Hurricane Hugo, had not been repaired properly.

Upon our request, VISS submitted a revised operating plan, a new cost and revenue forecast, and information on changes made in key technical personnel, financial resources and stockholder agreements. VISS stated that it had decided to inaugurate commuter service at the island airports and to continue the fight for the seaplane ramps in court. Another

change was the withdrawal by Mr. Salvatore Labate and Mr. Anthony Tirri as VISS shareholders and directors.[1] The other eight original VISS investors had confirmed their intention to pursue commuter certification and their shareholdings. VISS also provided evidence that it had finalized arrangements for working capital credit. The applicant furnished background information for two individuals whom VISS had selected to replace its previously named Director of Maintenance and Director of Quality Control. We asked the FAA both to verify that these two individuals were technically qualified to hold their positions and to investigate the charge made by AAI that VISS's aircraft had not been properly repaired. The FAA advised us that the two new key employees were properly qualified to serve in the named positions and that, after inspecting VISS's aircraft, the FAA found them to be airworthy.

CAI submitted four additional letters elaborating upon its initial objection and repeating its call for issuance of a new show-cause order. After considering all of the information filed by the objectors and the applicant, we concluded that the modifications in VISS's application were not of sufficient consequence to justify the publication of a new show-cause order and that nothing contained in any of the objectors' filings led us to question our previous tentative finding of fitness. Therefore, on February 1, we issued Order 91-2-1 finalizing the tentative conclusion made in Order 90-11-34 that VISS was fit to engage in commuter air carrier service.

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1. Mr. Labate owns a fixed-base operation and aviation consulting company in Revere, Pennsylvania. Mr. Tirri owns several airline management concerns in the Caribbean area. He had acquired the assets of VISS's bankrupt predecessor and made them available to VISS through purchases and leases. He previously was President of Guy-America Airways, which had been shut down by the FAA in 1983 for serious safety violations.

Appendix H

On the day that Order 91-2-1 was signed and issued, we received from CAI an improperly filed Motion for Leave to File and Motion to be Added to Service List. The motion addressed Mr. Tirri's role in the safety compliance problems of Guy-America Airways and alleged that VISS had withheld the fact that the U.S. District Court, Eastern District of New York, had issued a preliminary order on April 15, 1983, restraining Guy-America, Mr. Tirri, and other representatives of Guy-America from engaging in air carrier activities.[2] CAI further argued that the changes that VISS made in fitness-related areas following publication of the show-cause order were so extensive as to constitute a new application, necessitating the issuance of a new show-cause order in the proceeding, or, alternatively, that the application for fitness should be denied on the grounds that it contains a highly significant and material misrepresentation. (*Motion*, at 4) Since the motion was not received in time to be considered in Order 91-2-l, Department staff answered CAI's motion in a letter, dated February 7, stating that none of the facts presented by CAI would result in the Department's reaching a different conclusion concerning VISS s fitness to operate.

Petition by Caribbean Airboats Inc.

On February 8, CAI filed a Petition for Reconsideration and Stay of Order 9l-2-1.[3] CAI reiterates and amplifies the arguments

2. The Court found that, following the emergency revocation of Guy-America's FAA Air Carrier Certificate, Guy-America had continued to engage in air transportation as an indirect carrier by arranging for another airline to provide flights for Guy America's passengers. (18 Av. Cas. (CCH) P17,390)

3. Although we stated in Order 90-11-34 that, since we had provided for the filing of objections to that order, we would not entertain petitions for reconsideration, we have decided to accept CAI's petition in the public interest.

made in its earlier Motion and petitions the Department either to reconsider its finding of fitness in Order 91-2-1 and deny VISS's application on the grounds that the applicant withheld information that would reflect negatively on its compliance disposition, or to reconsider its finding that the changes instituted by VISS following publication of Order 90-11-34 do not constitute a new application calling for the issuance of another show-cause order.

CAI notes that three of the original participants in VISS's corporate structure (Mr. Labate, Mr. Tirri, and Mr. Tirri's company, Caribbean Airline Services, Inc. (CAS), the holder of the leases on the aircraft and the actual applicant for the seaplane ramp lease) are no longer parties to the shareholder agreement, but argues that Mr. Tirri's having now removed himself as a VISS stockholder and director does not alter the fact that information relevant to the company's compliance disposition was withheld.

The petitioner also charges that VISS failed to keep the information in its application current when it did not notify the Department in a timely manner that its Director of Maintenance had resigned and been replaced.

Finally, CAI claims that in serving the airports with seaplanes, VISS will be at a disadvantage that will affect its potential revenues because the carrier will face competition not only from a company serving the seaplane bases, which are more desirably located for tourists and business persons, but also from an entrenched carrier providing service at the airports with aircraft that arguably can be operated more efficiently on land than can VISS's amphibian aircraft. The petitioner concludes that the public should be given an opportunity to comment upon the implications of all of these matters.

Appendix H

Filing by Aviation Associates Inc.

On February 8, the Department received correspondence from AAI alleging that VISS made false statements in its application, specifically, that two individuals, Mr. Richard Nackenhorst and Mr. Rafael Javier,[4] were employed by VISS as Director of Quality Control and Director of Maintenance, respectively, when they were actually employees of AAI. AAI supplied statements signed by the two individuals affirming that they had not agreed to work for VISS. In addition, AAI alleges that the FAA has determined that the maximum seating capacity of two of VISS's three aircraft is 10 passengers rather than 15, as was represented by VISS.

By letter dated February 11, Department staff asked VISS to respond to AAI's allegations and to provide (1) statements signed by the other key technical managers affirming their employment in their respective positions with VISS; (2) a qualifications statement for the new Director of Maintenance; and (3) a description of any additional changes made since the issuance of Order 90-11-34.

Answer by VISS

On February 12, VISS filed a Motion for Leave to File an Unauthorized Document and an Answer to CAI's Petition.[5] VISS asserts that the Department should not entertain CAI's Petition because the Order to Show Cause (90-11-34) had stated that

4. In Order 91-2-1, we referred to Mr. Javier as Mr. Restituyo since his full name is Rafael Javier Restituyo. However, we understand that he refers to himself as Rafael Javier.

5. We will grant VISS's Motion.

such petitions would not be considered, or, in the alternative, that it should deny the Petition on the grounds that it contains repetitive allegations and was submitted by a would-be competitor only to delay VISS's fitness proceeding. VISS also responded to the Department's information request.

VISS states that it did not attempt to withhold information about the District Court's preliminary injunction because it did not become aware of the Court action until CAI filed its Motion on February 1. VISS asserts that it had listed in the application all of the orders issued by the FAA and the CAB against Guy-America Airways and had stated that Mr. Tirri had been president of that company at the time; that its statement that no FAA orders were issued against Mr. Tirri personally is correct; that the Court's action was an extension of the FAA's revocation of the operating certificate of Guy-America Airways and the injunction does not attribute any violations to Mr. Tirri personally;[6] and that the Department had independently verified Mr. Tirri's compliance record with the FAA, which had found nothing problematical concerning Mr. Tirris involvement with VISS.

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6. On February 16, 1983, the FAA took action to revoke Guy -America's operating authority on an emergency basis after finding that Guy-America had committed numerous and serious safety violations. At the time, Mr. Tirri was president of Guy-America. Guy-America filed an appeal of the FAA's action with the National Transportation Safety Board (NTSB). Before the NTSB had reached a decision on the appeal, the FAA found that Guy-America, without an operating certificate, was continuing to engage in air carrier activities by accepting reservations and payments from passengers and utilizing the services of another air carrier to perform the flights. The FAA requested the District Court to restrain Guy-America from engaging in such activities. On April 15, 1983, the Court found in favor of the FAA and, pending the outcome of the appeal to the NTSB, issued a preliminary restraining order to prevent Guy-America and its key personnel, including Mr. Tirri, from engaging in any further air carrier activities. After the NTSB reaffirmed the FAA's action, the Court case was dismissed as moot.

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VISS states that in revising its operating plans to reflect service at the airport locations, it reduced its revenue projections and increased its operating cost projections accordingly, which calculations the Department found reasonable. VISS charges that CAI has not challenged the qualifications of the new managers appointed by VISS.

In answer to the Department's information request, VISS stated that it listed Messrs. Nackenhorst and Javier as key personnel based on their having provided their resumes and orally agreed to accept employment.[7] VISS also stated that it has appointed Mr. Jose Luis Diaz as Director of Maintenance, and it provided a resume of his qualifications.[8] After having reviewed his qualifications and investigated his compliance record, we are

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7. The applicant states that Mr. Nackenhorst changed his mind about accepting the position of Director of Quality Control with VISS, of which VISS advised the Department in a letter dated December 28, 1990. The company then named Mr. Ganase Lall to hold that position; his qualifications were discussed in Order 91-2-1. VISS further states that incorrect information was provided to the Department that Mr. Javier had agreed to accept the position of Director of Maintenance, whereas the position he had agreed to take was that of senior mechanic. VISS provided a copy of a letter from Mr. Javier dated February 25, 1991, to the Director of Maintenance of Aviation Associates wherein he resigned his mechanic position with that company to accept employment with VISS as senior mechanic.

8. Mr. Diaz has been employed since 1988 as a helicopter mechanic with the Police Department of Puerto Rico. Previously, he worked as an aircraft mechanic for the following organizations: Midway Airlines in Miami (1986-87), Southern Air Transport in Miami (1986), Batch Air Universal in Miami (1986), Chalk's International Airline in Fort Lauderdale (1982-86), and Dade Helicopter in Miami (1981-82). Mr. Diaz holds an Airframe and Powerplant Mechanic certificate from the FAA, and has been approved by the FAA to hold the position of Director of Maintenance with VISS.

satisfied that Mr. Diaz is qualified to serve as VISS's Director of Maintenance.

In response to AAI's allegation that the FAA has substantially reduced the maximum seating capacity of VISS's piston VISS states that the FAA has made no such determination. VISS also points out that, in its cost and revenue recalculations to support the proposed airport service, the company assumed a 10-seat capacity for its piston aircraft due to weight restrictions.

VISS also advised the Department of the addition of a new shareholder, Mrs. Ann Truett F. Moore, wife of Mr. Roland H. Moore, a VISS Director and its General Counsel. She has acquired the 500 shares of non-voting preferred stock previously held by Mr. Deleo, the President of VISS, for approximately the same investment. Mr. Deleo's total investment has therefore decreased by about one-third. In addition, each of the other seven shareholders (except Mr. Moore) has increased his or her investment by amounts ranging between about 10 and 30 percent to reflect the level of involvement each has in the company. As a result of these investment adjustments, the company's total paid-in capital has increased by approximately 10 percent.

Discussion

CAI requests that the Department deny VISS's application for a fitness determination on the grounds' that the applicant withheld information involving Mr. Tirri that would reflect negatively on its compliance disposition.

In its response, VISS states that it had no knowledge of the District Court's order against Mr. Tirri. Although it *is* not clear why Mr. Tirri did not report the District Court order to VISS or

to the preparers of VISS's application, it does not appear that VISS attempted to hide Mr. Tirri's past compliance problems since it reported the various FAA and CAB actions that were taken against Guy-America while Mr. Tirri was president.

In any event, we have seen no evidence that Mr. Tirri did not comply with the Court order or that, in the eight ensuing years, he has been the subject of any other FAA investigations or enforcement actions; Mr. Tirri's initial role as an investor and one of eight directors did not appear to enable him to control the applicants activities; and he has now withdrawn as a VISS stockholder and director, which should lessen any ability he might have had to exercise influence over VISS's operations. While we do not condone VISS's having omitted a discussion of the District Court's action against Guy-America and Mr. Tirri, it appears that the omission was inadvertent and that the applicant did not attempt to hide the violation history.

CAI also asserts that the Department erred in deciding in Order 91-2-1 not to publish a new show-cause order after VISS had made what CAI regarded as sufficient changes in its application to render it a new application.

It is to be expected that a company engaged in organizing a new business will make changes. We find it rare that an applicant for air authority authority able to implement in final the exact plan of operation with the same personnel and resources that it first presented in its application. However, we also expect applicants to keep the Department advised in a timely manner of changes in its application.

VISS was not as prompt as it should have been in advising the Department of significant events or changes, particularly the

news that the company was not granted the right to lease the public seaplane ramps and that its Director of Maintenance had changed. VISS stated in its reply to CAI's Answer to Order 90-11-34 that it intended to notify the Department of those and any other changes it had made at the time it obtained its FAA operating certificate and was ready to commence operations. Applicants are required to keep the Department apprised of all changes affecting their fitness on an ongoing basis.

CAI alleges that VISS, in choosing to serve the island airports with its Grumman Mallard aircraft, will be at a competitive disadvantage and will experience lower load factors and reduced revenues. Our finding that VISS is fit to conduct commuter air carrier service does not imply that the proposed service will be profitable.[9] The Department's concern, rather, is that VISS conduct its operations safely and in compliance with the applicable laws and rules.

We discussed in Order 91-2-1 all of the changes VISS had made up to that time and concluded that they were not of such significance as to require another opportunity for the public to comment upon them.[10] The important fundamental components

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9. It has been the Department's policy not to challenge an applicant's operating plans if it has reasonably forecast the costs and revenues associated with its service proposal and if it has demonstrated that it has access to funding sufficient to pay its pre-operating costs plus a sufficient reserve to cover its initial operations.

10. CAI also states that one of the changes made by VISS upon which the public should have an opportunity to comment is a change in the Director of Operations; however, the appointment of Mr. Rullman to this position and the discussion of his qualifica tions was presented in Order to Show Cause 90-11-34. We received no comments from the public concerning his qualifications.

of the application had not changed — the identity and location of corporate entity, its citizenship, the preponderance of its shareholders and the relative level of their investments, its officers and the majority of its directors, the type of operations to be conducted and equipment to be utilized, the points to be served, the financial ability of the company to undertake the operations, and the ability of the company to comply with the applicable laws and rules. Moreover, we note that, while CAI has taken several opportunities to make certain that the Department was aware of changes made by VISS in its application, the petitioner has not presented any evidence that any of the changes will render VISS not fit.

Furthermore, we consider the changes made by VISS since publication of Final Order 91-2-1 (the addition of Mrs. Moore as a new VISS shareholder, her acquisition of the company's non-voting preferred stock from Mr. Deleo, and the appointment of Mr. Diaz as Director of Maintenance) similarly to be changes not requiring public comment. These are the types of changes which carriers frequently advise the Department they have made and the public is not normally provided an opportunity to comment on such changes.

AAI has alleged that VISS made false statements to the Department in connection with the appointment of two employees. VISS states that one of these individuals changed his mind about the position offered, and a misunderstanding arose over the position which the other had agreed to take.

We can find no advantage to VISS from deliberately making false statements to the Department in this matter. While it is not our intent to diminish the concern with which the Department views the making of false statements by applicants, it appears

that the incorrect representations made by VISS resulted from misunderstandings rather than from a desire to mislead the Department. In fact, VISS subsequently furnished a statement signed by one of the two prospective employees certifying that he has accepted a position as senior mechanic with VISS.

Findings and Conclusions

After reexamining all of the facts in this case, we find that, while we would have preferred that VISS be more prompt and accurate in its filings and representations, we do not believe that these failures are so significant that the applicant must be considered not fit or that the public requires another opportunity to provide comments on its fitness. The only two parties who have filed answers in this proceeding, CAT and AAI, have made comments following the issuance of both Order 90-11-34 and Order 91-2-1, yet have not produced any evidence, other than the applicant's omissions or misstatements in its application, as to why the Department should find VISS not fit, and those omissions and misstatements are insufficient in this case to warrant a negative fitness determination.

Therefore, upon reconsideration, we will deny CAI's request that VISS's application be denied and that the effectiveness of its commuter authority be stayed, and we will deny CAI's request that the Department reconsider its conclusion in Order 91-2-1 that the changes made in VISS's application do not constitute a new application requiring the issuance of another order to show cause. We will reaffirm the findings and conclusions in Order 91-2-1 that VISS is fit, willing, and able to engage in scheduled passenger operations and to receive in transfer the commuter air carrier authority previously held by Virgin Islands Seaplane Shuttle, Inc.

Appendix H

ACCORDINGLY,

1. We reaffirm the findings in Order 91-2-1 that Sea Air Shuttle Corporation d/b/a Virgin Islands Seaplane Shuttle is fit, willing, and able under section 419(e) of the Federal Aviation Act to provide scheduled passenger service as a commuter air carrier, and to receive in transfer the commuter air carrier authority issued to Virgin Islands Seaplane Shuttle, Inc., by Order 82-5-20;

2. We grant the motion of Caribbean Airboats, Inc., to file a petition for reconsideration and stay;

3. We deny the petition for reconsideration and stay of Caribbean Airboats, Inc.;

4. We grant the motion of Sea Air Shuttle Corporation d/lo/a Virgin Islands Seaplane Shuttle to file an unauthorized document; and

5. We will serve a copy of this order on the persons listed in Attachment A to this order.

By:

Jeffrey N. Shane
Assistant Secretary for Policy
and International Affairs

(SEAL)

APPENDIX I — STATEMENT OF HONORABLE DEREK HODGE

TESTIMONY OF HON. DEREK HODGE, LIEUTENANT GOVERNOR, U.S. VIRGIN ISLANDS BEFORE U.S. SENATE JUDICIARY COMMITTEE

Mr. HODGE. Thank you, Mr. Chairman. Good afternoon, Senator Thurmond and Senator Specter.

I am Derek Hodge and I am presently serving as the elected Lieutenant Governor of the U.S. Virgin Islands. I am honored to have this opportunity to introduce Tom Moore whom the President has nominated to be judge of the U.S. District Court for the Virgin Islands.

Mr. Chairman, we are deeply pleased to see this action to fill one of the two vacancies in the district court. This bench has been vacant too long. We believe we have the dubious honor of having the only district court in the country with a 5-year vacancy.

The committee is to be commended for scheduling Mr. Moore's confirmation hearing with enough time remaining in the session to ensure that a confirmation vote can occur before a German sine die. The administration of justice in the territory requires a fully functioning Federal district court. We strongly urge prompt and final action in this confirmation process and equally timely and prompt action in filling the other vacancy in our court as well.

Mr. Chairman, Tom Moore is a 1961 graduate of Harvard University. He obtained his juris doctor from Georgetown University Law Center here in Washington. Tom graduated from Georgetown Law a few years before my own class from that outstanding institution. After this legal education, Tom had the good sense to move to the Virgin Islands. Tom Moore a..d his

lovely wife and two children have now lived among us in the Virgin Islands for nearly two decades.

In the Virgin Islands, he has gained valuable experience as an assistant U.S. attorney from 1976 through 1978. He then entered private practice. I am certain that he will bring to the bench the same excellent qualities that have been the hallmark of his performance in the practice of law. Tom's knowledge together with his equity and fairness will no doubt assure well reasoned, judicial opinions.

Speaking for all Virgin Islanders, I can say that it will be a great relief to have once again a U.S. district court judge who resides in the territory.

Mr. Chairman, thank you for this opportunity to appear on behalf of Tom Moore's nomination and for the honor to introduce him to this distinguished panel.

I also wish to say that I look forward to appearing again before your committee shortly to introduce the Honorable Raymond Finch whom President Bush called this morning informing him that he would be nominated for our other district court position. I urge the committee to approve favorably in Tom Moore's nomination to the full Senate for prompt action.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much.

Following our usual practice, we will hear from Judge Stahl, if he would be good enough to come back. Judge Stahl, do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Appendix I

Mr. STAHL. I do.

[The biographical statement of Judge Stahl follows:]

APPENDIX J — LETTER TO JUDGE THOMAS K. MOORE FROM LEWIS F. HUCK DATED APRIL 2, 1996

April 2, 1996

CERTIFIED MAIL — R/R/R

Thomas K. Moore, Chief Judge
U.S. District Court of the V. I.
Division of St. Thomas – St. John
Federal Bldg., Federal Court House
Veterans Drive
Charlotte Amalie, St. Thomas
U.S. Virgin Islands 00801

SUBJECT: SEA AIR SHUTTLE CORPORATION

Dear Judge Moore:

Reference is made to the five documents filed on March 20, 1996, by the V.I. Attorney General's office on behalf of Defendants Farrelly and Hodge in the Civil Rights Case, which documents I received on March 27, 1996.

The public record and the record in the prior lawsuit established beyond any possible doubt that the subordinates of Defendants Farrelly and Hodge willfully deprived SEA AIR SHUTTLE CORPORATION (SEA AIR) of its federally granted and constitutionally protected right to use the VIPA's seaplane airports granted SEA AIR by the DOT/FAA, and they conspired to injure SEA AIR by denying SEA AIR the use of the VIPA's seaplane airports in order to protect Caribbean Airboats, Inc., from competition by SEA AIR, as testified in the prior lawsuit.

Appendix J

It is settled law that liability is imposed on supervisory governmental officials who acquiesce in actions of subordinates that violate the civil rights of others. – See *Jones v. Members of Police Commissioners*, 435 F. Supp. 797 (1977).

Public officials can be held liable for monetary damages for deprivation of rights where the public officials exhibited a "deliberate indifference" to the deprivation of a plaintiff's constitutional rights. See *Leite v. City of Providence*, 463 F. Supp. 585 (1978). Also, please see paragraphs 143 through and including 173 of the First Amended Complaint.

There can be no doubt that Defendants Farrelly and Hodge can be sued in their individual capacities, and are liable in money damages to SEA AIR for the willful violations of SEA AIR's civil rights pursuant to 42 U.S.C. Section 1983, for their deliberate and willful failure to overturn the unlawful actions of their subordinates who deprived SEA AIR of its civil rights. See the above cited cases, the First Amended Complaint, and *Hafer v. Melo, 112 S. Ct. 358 (1991).*

The Civil Rights Case is based on the fact that Federal crimes were committed by the Defendants and the Senators who voted to support them, and the public record, and the record in the prior lawsuit established that fact beyond any possible doubt.

Federal crimes are not frivolous actions, yet the Attorney General's office seeks to justify representing Defendants Farrelly and Hodge by claiming that this action, pursuant to 42 U.S.C. Section 1983, based on Federal crimes, is a frivolous action. Further, Plaintiff was encouraged to bring this civil rights action by 49 U.S.C. Section 1988, and *Hafer* removes all possible doubt that Defendants Farrelly and Hodge can be sued in their

individual capacities for their involvement in depriving SEA AIR of its civil rights.

Defendants Farrelly and Hodge can only be sued in their individual capacities, for damages for acquiescing in, and/or approving of the deprivation of SEA AIR's civil rights by their subordinates, and in this Civil Rights Case they are so sued for so doing.

I again respectfully call to your attention the concluding statement in my letter to you dated February 12, 1996, a copy of that letter was furnished to Julio Brady, Esq., Attorney General for the Virgin Islands, wherein I state that the United States Supreme court (in the *Hafer* case) held,

> "Officials sued in their individual capacities (as Defendants Farrelly and Hodge are sued in the Civil Rights Case) come to court as individuals" and "are not absolutely immune from personal liability under 42 U.S.C. Section 1983 solely by virtue of the 'official' nature of their acts."

It would seem to follow from the foregoing that if the Attorney General's office could properly represent Defendants Farrelly and Hodge in the Civil Rights Case, then any other resident of the Virgin Islands accused of serious wrongdoing is entitled to be represented by the Attorney General's office.

Reference is made to the Attorney General's office requesting entry of summary judgment in favor of Defendants Farrelly and Hodge because Plaintiff failed to properly issue a demand pursuant to FRCP Rule 23.1, Plaintiff's claim should

be dismissed under the doctrines of Res Adjudicata and Issue Preclusion, and that Plaintiff has no private right of action under the Federal Aviation Act. Plaintiff respectfully calls to the Court's attention that Plaintiff's Response filed November 14, 1995, effectively disposed of those matters as being without merit for the reasons stated in the Response, none of which reasons were addressed by the Attorney General's office, nor did the Attorney General's office attempt to refute them, even though that office received a copy of that Response. That Response is incorporated in this response by reference thereto.

The undersigned now turns to the matter of how the Attorney General's office was "given the opportunity" to file the above referred to five documents.

As indicated in the enclosed copy of my letter to Joseph J. Mingolla, Esq., and as indicated in my letter to you dated February 12, 1996, I am extremely troubled by the fact that the opportunity to file the five documents was based on the stipulation filed November 15, 1995, that the Court "ordered" the same date it was entered into, which stipulation in turn was based on the administratively closed entry of September 12, 1994, that could only have been entered in the record in order to obstruct justice, and the fact that the Court, thirteen months after it was filed, granted Mr. Mingolla's motion to re-open the case.

It is respectfully brought to your attention that you even entered an order denying my admission pro hac vice[1] during the

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1. Denied because Judge Moore found Petitioner participated with the Respondents in unlawfully depriving Sea Air of its federal right and privilege to use the ramps and refused to reconsider order when Petitioner pointed out that was not possible.

thirteen month period without ever making any reference to the fact that the case was administratively closed. Chief Judges generally do not enter orders in cases that have been administratively closed.

Further, you are very respectfully reminded that on more than one occasion, beginning two years ago, the Court was requested to rule that the Attorney General's office could not legally represent Defendants Farrelly and Hodge in this Civil Rights Case because they are sued in their individual capacities, and not in their former official capacities, and the Court has not issued its ruling in that regard except indirectly by granting Mr. Mingolla's long-standing Motion to re-open so that the Attorney General's office could take advantage of the opportunity afforded by the "court-ordered" stipulation that provided the opportunity for the Attorney General's office to file the documents, the subject of this response.

Plaintiff alleges that the Attorney General's office had no authority whatsoever to represent Defendants Farrelly and Hodge in that stipulation, and that Joseph J. Mingolla had no right or authority whatsoever to enter into that stipulation on behalf of the Plaintiff, because that stipulation cannot possibly be construed as being beneficial to the Plaintiff.

Accordingly, Plaintiff very respectfully again, urges the Court to find the stipulation is invalid and null and void, and to find, accordingly, that the five documents filed by the Attorney General's office, pursuant to the stipulation, that required this response are also invalid and null and void.

For the aforesaid reasons Plaintiff respectfully urges the Court to also deny the Attorney General's office plea for the

entry of summary judgment in favor of Defendants Farrelly and Hodge, since such entry would be contrary to the weight of evidence set forth herein and as established by the public record, and the record in the prior lawsuit.

Plaintiff also respectfully again, urges the Court to remove all three pending cases to a Federal Court in another jurisdiction. Without any possible doubt, the evidence in the Civil Rights Case indicates that Defendants Farrelly and Hodge are liable to SEA AIR for their willful failure to take corrective action when they learned that their subordinates had willfully deprived SEA AIR of its right to use the VIPA's seaplane airports as the DOT/FAA specifically authorized and certificated SEA AIR to do.

That matter was so important to the economy of the Virgin Islands that the Virgin Islands Senate held a three day hearing on the subject. Further, the matter of the deprivation of SEA AIR's federally granted and constitutionally protected right to use the VIPA's seaplane airports was the subject of widespread media coverage, clearly establishing that Defendants Farrelly and Hodge could not possibly have been unaware of the need for them to take corrective action in order to avoid liability to SEA AIR, yet they knowingly and deliberately failed to take the required corrective action.

Accordingly, Plaintiff very respectfully appeals to the Court to issue an order that states Defendants Farrelly and Hodge have violated SEA AIR's civil rights, and are liable to SEA AIR for doing so.

Appendix J

Sincerely yours,

s/ Lewis F. Huck
Lewis F. Huck
15084 Kimberley Lane
Houston, Texas 77079

Enclosure

Copies To:
Joseph J. Mingolla, Esq.
Robert S. Griggs, Esq.
Julio Brady, Esq., Attorney General of the Virgin Islands
Frederick G. Watts, Esq.
Douglas L. Capdeville, Esq.
Vincent A. Colianni, Esq.
Richard H. Hunter, Esq., President of the V.I. Bar Assoc.

APPENDIX K — EXCERPTS OF MAIN BRIEF DATED AUGUST 8, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CIVIL NO. 96-7341
CIVIL NO. 1994-1

Lewis F. Huck, Derivatively on behalf of SEA AIR SHUTTLE CORPORATION

Plaintiff

v.

ERIC DAWSON, ROSALIE SIMMONDS BALLENTINE, RHUDEL GEORGE, LEO FRANCISC, ROBERT O'CONNOR, JR., WILLIAM QUETEL, GEORGE GOODWIN, LUIS SOTOMAYOR, EARL ROEBUCK, FORMER MEMBERS OF THE BOARD OF DIRECTORS, AND GORDON A. FINCH, FORMER EXECUTIVE DIRECTOR OF THE VIRGIN ISLANDS PORT AUTHORITY; FORMER LT. GOVERNOR DEREK M. HODGE, AND ALEXANDER FARRELLY, FORMER GOVERNOR OF THE VIRGIN ISLANDS,

Defendants

and SEA AIR SHUTTLE CORPORATION,

Nominal Defendant

(ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. THOMAS AND ST. JOHN)

Appendix K

CIVIL NO. 96-7342
CIVIL NO. 1994-18

Lewis F. Huck, Derivatively on behalf of SEA AIR SHUTTLE CORPORATION

Plaintiff

v.

VIRGIN ISLANDS PORT AUTHORITY

Defendant,

and

SEA AIR SHUTTLE CORPORATION

Nominal Defendant

(ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. THOMAS AND ST. JOHN)

* * *

based; because the issues were not litigated in the first suit and because different facts and proof would be required to sustain the present suits. In addition, the doctrine of **res judicata** should not be applied to the present suits as a matter of equity and because the present suits invoke a monetary remedy as opposed to injunctive relief and because the decision upon which the application of the doctrine was based was clearly erroneous.

Appendix K

VIII. ARGUMENT

A. If the cause of action in the second suit arises after the rendition of the judgment in the first action, it is a different cause of action not barred by the prior judgment.

Subsequent to the third and final of the decisions in the prior lawsuit issued on March 13, 1992, Sea Air continued to be denied access to the seaplane ramps by the continuing actions of the Defendants/Appellees. The company that had been awarded the exclusive lease for the seaplane ramp facilities failed completely to commence air passenger service of any kind at the ramps. No other carrier commenced service at the ramps. The ramps remained empty. In spite of this, and repeated requests of Sea Air to have access to the totally unused ramps, the VIPA refused to grant any access whatsoever, temporary, conditioned or otherwise. Being entirely a seaplane air carrier, the VIPA seaplane ramps were essential facilities for the economic survival of Sea Air. As a consequence, several month's later, at the end of June, 1992, Sea Air was forced to shut down its operations and liquidate.

As a consequence of its collapse and liquidation, Sea Air filed the present lawsuits for recovery of damages suffered as a consequence of the continuing denial of access to the seaplane ramps, occurring subsequent to the decisions in the prior lawsuit, seeking an entirely different remedy that could not logically have been asserted in the Prior Lawsuit because Sea Air was irrevocably injured at the end of June, 1992, before the mentioned events had even occurred.

In the prior lawsuit, the court entertained and adjudicated

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Sea Air's challenge to the VIPA bid procedure carried out in 1990 as defective under territorial law and violative of the antitrust laws, in denying injunctive and declaratory relief. These are not issues in the present suits. Here, Sea Air seeks compensation for damages suffered subsequent to the decisions in the prior lawsuit, as a consequence of the continuing denial of access to the seaplane ramps, based on Defendants/Appellants conduct being violative of federal law and depriving Sea Air of constitutionally protected rights.

The United States Supreme Court has decided that the doctrine of **res judicata** does not apply when the subsequent action involves a different cause of action than that raised in a prior action, *Lawlor v. National Screen Service Corp.* 349 U.S. 322, 99 L. Ed 1122, 75 S. Ct. 865, *Chapman vs. Goodmow's Adm'r,* 123 U.S. 540, 31 L Ed. 235, 8 S. Ct. 211.

Subsequent to the issuance of the decision of the District Court in March, 1992, the VIPA continued to unlawfully deprive Sea Air of the use of the seaplane ramps. This caused Sea Air to cease operations at the end of June 1992 and be liquidated. Therefore, assuming, solely for purposes of argument that **res judicata** was a valid defense to shield the Defendants/Appellees from civil liability for unlawful actions prior to the decision in the prior lawsuit issued on March 13, 1992, it is not a valid defense against a cause of action for liability based on events subsequent to March 13, 1992. See State Ex Rel. *Weasmer v. Manpower of Omaha, Inc.* 163 NEB 529, 80 N.W. 2d 580; *Fort Worth Stockyards Co v. Brown*, Tex. Civ. App., 161 S.W. 2d 549 (1942) that hold that lawsuits for similar actions subsequent to the prior decision are not barred by res judicata.

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B. Res judicata is not a valid defense to separate causes of action when the issues in those separate causes of action were not litigated in the prior lawsuit upon which the defense of res judicata is based.

The Prior Lawsuit, as mentioned above, involved a suit for injunctive relief based on the alleged violations of a territorial statute and antitrust statutes. The request to amend to raise certain constitutional issues as related to the injunctive relief sought was denied, Appendix Volume A, pp 275-281, and, thus, cannot be said to have been litigated. The issues involved in Sea Air's causes of action that are here on appeal are different from the issues in the Prior Lawsuit described above and these issues were not litigated in the prior lawsuit upon which the District Court based its res judicata decision. The complaint in the *Dawson,* et al, case (the present Civil Rights case) is for redress in damages from the Dawson defendants pursuant to 42 U.S.C. Section 1983 and *Hafer vs. Melo,* 502 U.S. 21, (1991) for the willful violation of Sea Air's civil rights in depriving Sea Air of a constitutionally protected right to use the seaplane ramps. The complaint in Sea Air's consolidated case against the VIPA is for damages pursuant to 28 U.S.C. Section 1331, for unlawfully depriving Sea Air of its rights to use the VIPA's Ramps and the existence of a right to a remedy in damages as provided for in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, (1971).

The United States Supreme Court in the key cases of *Cromwell v. County of SAC,* 94 US 351 (1877), *Commissioner of Internal Revenue v. Joseph Sunnen,* 333 U.S. 591 (1948), *Partmer Corporation v. Paramount Pictures Theatres Corporations* et als., 349 U.S. 89, (1954), support the principle that **res judicata** is not applicable in circumstances similar to the present case. In the words of the court:

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> "where the second action between the same parties is upon a different claim or demand, the judgment on the prior action operates as an estoppel only as to those matters in issue or points controverted. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." See *Cromwell,* **supra,** at 353.

In the present cases, the matters raised were not litigated in the Prior Lawsuit.

> C. If the two actions rest upon different sets of facts or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other,

While there are common factual elements between the prior lawsuit and the present lawsuits, particularly conduct of a continuing nature, any and all evidence concerning the events subsequent to the March 13, 1992 decision, including those concerning the continuing refusal to grant access to the seaplane ramps, the collapse of Sea Air and the damages caused, are all separate and distinct matters not raised or adjudicated by the decisions in the prior lawsuit. Given these circumstances the District Court should not have dismissed the actions here on

appeal on **res judicata** grounds. See *County of Mobile v. Kimball,* 102 U.S. 691, 26 L. Ed 238; *Thornbrough v. Barnhart,* 232 ARK 862, 340 S.W. 2d 569, *Wright v. Atlantic C.I.R. Co,* 40 GA App. 785, 151 S.E. 553; *Leuchten Macher v. Farm Bureau Mu. Ins. Co.* (Iowa) 460 N.W. 2d 858; *Phoenix Finance Corp. v. Iowa-Wisconsin Bridge Co,* 237 Iowa 165, 20 N.W. 2d 457, Cert. den. 328 U.S. 844, 90 L. Ed. 1618, 66 s. Ct. 1024,; *State Ex Rel: Weasmer v. Manpower of Omaha. Inc.,* 163 NEB. 529, 80 N.W. 2d 580; *Meirick v. Wittemann Lewis Aircraft Co.,* 98 NJL 531, 121 A. 670; *Bell v. Merrifield* 109 N.Y. 202, 16 NE 55; *Lipkind v. Ward* 256 App (Div 74), 8 NYS 2d 832, *Norwood v. McDonald,* 142 Ohio St. 299, 27 Ohio Ops 240, 52 NE 2d 67; *Jacob v. Jacob,* 92 OR 255, 180 P. 515; *Griggs v. Griggs,* 214 SC 177, 51 S.E. 2d 622; *Curtiss v. Crooks,* 190 WASH 43, 66 P. 20 1140.

> D. The doctrine of **res judicata** is an equitable doctrine aimed at serving questions of fairness and judicial economy. As such, it should be used sparingly, particularly in civil rights actions.

The Civil Rights Act was passed expressly to provide a remedy to citizens denied their constitutional rights by state officials acting under color of state law. To apply the doctrine of **res judicata** unduly would tend to defeat the purposes behind the statute. In *Bricker v. Sceva Speare Memorial Hospital* 339 F. Supp. 234 (DC 1972), the court recognized that:

> ". . . **res judicata** should be used sparingly in Civil Rights actions and its application is only proper between parties or their privies involving the same subject matter terminating in final judgment on the merits." (339 F. Supp. at 239.)

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In the prior lawsuit, there was no final judgment on the merits concerning the right to redress in damages for the deprivation of constitutionally protected rights due to conduct clearly illegal under federal aviation statutes, *Esteves v. Ortiz Alvares* (DC PR) 678 F. Supp. 963.

> F. Where the performance of an act is sought in one action and a money judgment in the other, the application of **res judicata** is inappropriate.

In the prior lawsuit, the remedy requested was the performance of an act predicated on asserted violations of territorial law and antitrust law. In the present lawsuits, the remedy being sought is redress for damages caused as a consequence of the deprivation of rights. The difference between the two is such that the application of **res judicata** is inappropriate, In re: *Heyder's Estate,* 48 Ill. App. 2d 119, (2d Dist) 198 N.E. 2d 350; *Renner v. Great House* (4th Dist) 12 ILL App 2d 338, 139 N.E. 2d 825.

> F. The doctrine of **res judicata** should not be applied if it is based on a prior decision which is clearly erroneous.

In the Prior Lawsuit, SEA AIR sought injunctive relief to obtain an agreement for the exclusive use of the VIPA's seaplane ramps pursuant to the territorial law that authorized such agreements. Sea Air had participated in the procedure on the assumption that it was a legal proceeding. The District Court in the Prior Lawsuit, for the reasons cited in its decisions, denied the injunctive relief requested.

However, federal law forbids exclusive use contracts for

air navigation facilities. Under 49 U.S.C. Section 1349, DOT/FAA Advisory Circular 150/5190 2A dated Apr. 4, 1972, and the provisions of twenty-four grant agreements between the VIPA and the DOT/FAA providing the VIPA with sixty-seven million dollars of federal funds for aviation purposes, under conditions that required the VIPA to make all its airports, land and sea, available on equal terms and conditions to all certificated air carriers. Even if Sea Air had been granted an exclusive use of the ramps lease it would have been illegal, null and void because federal funds were involved, *Niswonger v. American Aviation, Inc.*, 411 F. Supp. 769 (1975).

When Sea Air attempted to amend its complaint to assert counts predicated on the existence of the federal prohibitions, the request to amend was denied. In spite of that, the District Court addressed those issues, in part, in its decision dated March 13, 1992, and found that the VIPA granting of an exclusive use contract for the use of air navigation facilities constitutes the exercise of a proprietary right expressly authorized under both federal and territorial statutes. No mention was made of the prohibitory effects of 49 U.S.C. 1349 or the DOT/FAA Advisory Circular 150/5190 2A and the clauses in the contracts for the use of federal funds.

Of course, one cannot exercise a proprietary right that one does not have. If there is a specific federal prohibition against specific practice, one does not have the right to practice it. Therefore, it cannot be said as a matter of law, that the section of federal law that expresses no intent to restrict the exercise of proprietary rights granted a right to the VIPA that another section of the same law specifically forbids.

For purposes of the matter of **res judicata** being addressed

in the present appeal, the issues in the Prior Lawsuit of federal governmental immunity from antitrust challenges or the rationality of the VIPA decision under the territorial statute, are not issues in the present case. They are also irrelevant because they are predicated on conduct that is clearly illegal under federal law. The issues rejected by the District Court and then addressed in its final decision, referring to the Commerce Clause and Supremacy Clause and provisions of the federal aviation laws also cannot serve as a basis for the application of the doctrine of **res judicata** because the determination of the court in that case was clearly erroneous.

The doctrine of **res judicata** is an equitable doctrine. It should be applied only when equity so requires. It should never be applied to preclude a subsequent suit if the determination of the issue by the prior court was clearly erroneous because that would be using the doctrine to perpetuate an injustice. Two wrongs do not make a right. Even assuming there is any similarity between the raising of a right to compensation for damages arising under the Constitution and laws of the United States or for the deprivation of such rights as provided for under the Civil Rights Act, and the issues of injunctive relief under the Commerce Clause and the Supremacy Clause as asserted in the Prior Lawsuit, the determination of the court in the Prior Lawsuit that the VIPA was merely exercising a proprietary right in awarding exclusive use leases for the use of air navigation facilities is so clearly erroneous in light of the provisions of 49 USC 1349, the DOT/FAA Advisory Circular 150/5190 2A and the agreements between the VIPA and the federal agencies for the use of federal funds in the VIPA's air navigation facilities that it should not serve as a basis for applying the doctrine of **res judicata.** The **res** was not properly **judicata**.

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G. The application of the equitable doctrine of **res judicata** should not be enlarged beyond its clear limits.

The purpose behind the application of an equitable doctrine is to do justice. It cannot be denied that a terrible injustice has been committed against Sea Air. After investing hundreds of thousands of dollars in establishing an operational seaplane air carrier, it was denied access to air navigation facilities in crass violation of federal law, driving it out of business. The very government agency which denied access to the seaplane ramps to Sea Air on grounds related to-fitness (matters preempted by federal law), did so even though Sea Air was already operating at other air navigation facilities owned by the same agency and, subsequently, after terminating the exclusive use contract with the company that failed to provide any service, publicly announced it had entered into negotiations for the very same ramps with one of the two persons whose involvement with Sea Air they had previously decided rendered Sea Air unfit to receive such access. To deny Sea Air its day in court for redress in damages because the prior decisions ended injunctive relief on immunity grounds and a clearly erroneous determination of the legality of the territorial bid procedure for exclusive use contracts would be to perpetuate the injustice far beyond what the most minimal demands of equity would allow. See *Van Brode Milling Co. v. Kellog Co.*, 1133 F. Supp. 845 (DC Del.). **Res judicata** is not an absolute and a court should not adhere to the doctrine where its application would work an injustice, *Crocker Invest. Inc. v. Statesman Life Ins. Co.*, 515 So. 2d 1305, (Fla. App. D3). The doctrine may be said to adhere in legal systems as a rule of justice, *Queen City Coach Co v. Burrell* 241 NC 432, 85 SE 2d 688; *Evers v. Williams* 43 Ohio App 555, 12 OHIO L. ABS 726, 184 NE 10; *Permian Oil Co v. Smith,* 129 TEX 413, 73 SW 24

490, 111 ALR 1152; *REH v. ERR*, 124 TEX 446, 107 S.W. 2d 564, 111 ALR 1175; *Daniel v. Kittrell* (TEX Civ. App) 188 S.W. 2d 404, Writ REF. WOM; *Griffin v. Griffin*, 183 VA 443, 32 S.E. 2d 700, but only as fairness and justice require, *Bruszewski v. United States* (CA 3 PA 1950) 181 F. 2d 419, Cert Den. 340 U.S. 865, 95 L. Ed 632, 71 S. Ct. 87; *Monages v. Vital* (A1-PR) 170 F. 2d99, Cert. Den. 335 U.S. 911, 93 L. ed 444, 69 S. Ct. 483; *Masterson v. Commissioner* (CA 5 TEX) 141 F. 2d 391 also see *Stadler v. Cherry Hill Developers, Inc.* (FLA App D2) 150 So. 2d 468. The principles of fundamental fairness in the sense of due process sense and the public policy underlying the principle of **res judicata** must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which to present his case, *Pittman v. La Fontaine* (DCNJ) 756 F. Supp. 834. "The litigant against whom issue preclusion is invoked must have had a full and fair opportunity to litigate the issue in the previous tribunal." 756 F. Supp. at 841. See also, *Bernhard v. Bank of America National Trust & Sav. Assoc.*, 19 CAL 2d 807, 122 P 2d 892; *Jacobs v. Corley* 732 S.W. 24 916 (Mo. App.), Later Proceeding, 793 S.W. 2d 512 (Mo. App.), Later Proceeding, 820 S.W. 2d 668 (Mo. App.); *Manu-Tronics, Inc. v. Effective Management Systems. Inc.*, (App) 163 WIS 2d 304, 471 N.W. 24 263; *McFadden v. McFadden*, 239 OR 76, 396 P 2d 202; *Hill v. Coca Cola Bottling Co.* (CA2 NY) 786 F. 2d 550; *United States v. Stillman* (CA3 NJ) 167 F. 2d 607, Cert. Den 335 U.S. 825, 93 L. ed 379, 69 S. Ct. 48; *Pittman v. LaFontaine* (DC NJ) 756 F. Supp 834; *Teitelbaum Furs, Inc. v. Dominion Ins. Co.* 58 CAL 2d 601, 375 P 2d 439, Cert. Den. 372 U.S. 966, 10 L. Ed 130, 83 S.Ct. 1091; *Niles v. Niles*, 111 A 2d. 697; *Gollner v. Cram*, 258 Minn 8, 102 N.W. 2d 521.

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CONCLUSION

In the present cases, Sea Air has not had an opportunity to present its case for damages suffered subsequent to decision in the Prior Lawsuit predicated on the deprivation of constitutional rights and considering the illegality of the conduct of the VIPA and its officials under the federal aviation laws because essential facts giving rise to the causes of action here on appeal had not occurred and the legal issues presented here were not litigated in the Prior Lawsuit. This unfairly deprives Sea Air of its day in court. As an equitable doctrine, **res judicata** should not be applied so as to defeat the ends of justice *Smith v. Pinner,* 68 Ariz. 115, 201 F. 2d 741; In Re *Guardianship of Di Carlo*, 3 CAL 2d 225; 44 P 2d 562, 99 ALR 990, *McGaffey v. Sudowitz* (4th Dist.) 189 CAL App. 2d 215, 10 CAL Rptr 862; nor can it be applied to work an injustice, *Beverly Beach Properties, Inc. v. Nelson* (FLA) 68 So 2d 604, 41 ALR 20 1071, cert. den., 348 U.S. 816, 99 L. ed 643, 75 S. Ct. 27; *American Province of Servants v. Metropolitan Utilities Dist.* 178 NEB 348, 133 N.W. 2d 466. For the aforesaid reasons, the decision of the District Court should be reversed.

X. CERTIFICATION OF BAR MEMBERSHIP

The undersigned attorney hereby certifies that he has been a member in good-standing of the bar before the United States Court of Appeals for the Third Circuit since November 19, 1984.

XI. OPINION AND ORDER AND JUDGMENT BEING APPEALED

Attached.

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I HEREBY CERTIFY that on this date two true and faithful copies of the foregoing appellant's brief have been served on each of the attorneys for defendants/appellees by first class prepaid United States mail.

Respectfully submitted, this 8th day of August, 1996.

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APPENDIX L — EXCERPTS OF REPLY BRIEF DATED OCTOBER 23, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CIVIL NO. 96-7444
CIVIL NO. 96-7341
CIVIL NO. 1994-1

Lewis F. Huck, Derivatively on behalf of SEA AIR SHUTTLE CORPORATION

Plaintiff

v.

ERIC DAWSON, ROSALIE SIMMONDS BALLENTINE, RHUDEL GEORGE, LEO FRANCISC, ROBERT O'CONNOR, JR., WILLIAM QUETEL, GEORGE GOODWIN, LUIS SOTOMAYOR, EARL ROEBUCK, FORMER MEMBERS OF THE BOARD OF DIRECTORS, AND GORDON A. FINCH, FORMER EXECUTIVE DIRECTOR OF THE VIRGIN ISLANDS PORT AUTHORITY; FORMER LT. GOVERNOR DEREK M. HODGE, AND ALEXANDER FARRELLY, FORMER GOVERNOR OF THE VIRGIN ISLANDS,

Defendants

and SEA AIR SHUTTLE CORPORATION,

Nominal Defendant

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CIVIL NO. 96-7342
CIVIL NO. 1994-18

Lewis F. Huck, Derivatively on behalf of SEA AIR SHUTTLE CORPORATION

Plaintiff

v.

VIRGIN ISLANDS PORT AUTHORITY

Defendant,

and

SEA AIR SHUTTLE CORPORATION

Nominal Defendant

(ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE VIRGIN ISLANDS, DIVISION OF ST. THOMAS AND ST. JOHN)

(CONSOLIDATED)

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Appendix L

PLAINTIFF/APPELLANT'S CONSOLIDATED REPLY BRIEF

1. *Issues Raised Below.*

Defendants/Appellees' contend that the arguments of Plaintiff/Appellant were not raised below.

The essence of Plaintiff/Appellant's arguments are that the causes of action in the present suits are causes of action for damages arising from events occurring after the prior judgment upon which the court below relied in dismissing the present suits. This was addressed below in "Plaintiff's Response. . . .", etc. See Appendix, Volume III, page 251. The matter of the legal error of the prior decision was addressed below as well. See Appendix, Volume A, page 379-386.

2. *Demise of Business Relevance*

Defendants/Appellees assert that the collapse of Sea Air after the decision in the first case is irrelevant to the application of **res judicata.**

The doctrine providing that events occurring after the events giving rise to the earlier claim preclude the application of **res judicata,** as embodied in *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 328, 75 S.Ct. 865, 868-869, 99 L. Ed. 1122(1955), has been supported by the Third Circuit in *Labelle Processing Co. v. Swarrow,* 72 F.3rd 308, 313-314, (3rd Cir. 1995), (A case involving an identical claim seeking an identical remedy, but, after a change in circumstances subsequent to the original determination, **res judicata** was inapplicable) and; *Allegheny Intern. v. Allegheny Ludlum Steel Corp.*, 40 F.3rd 1416, 1429-

1430, (3rd Cir. 1994), (**Res judicata** not applicable to a claim for recovery of expenses incurred subsequent to the prior suit, arising from the same transactions but, the incurrence of which had not occurred at the time of the prior suit) and; *Alexander & Alexander, Inc. v. Van Impe*, 787 F.2d 163, 165-166, (**Res judicata** does not bar a claim for damages for an injury that did not occur until after the entry of the prior judgment).

Defendants/Appellees attempt to imbue their argument with force by using strong language and asserting an absence of proof concerning the changed circumstances of Sea Air that gave rise to the claims in the present suits. However, the cases below did not go to trial and the dismissal was based on **res judicata**, after cross motions of the question of liability only. The doctrine of **res judicata** is a legal determination based on the allegations of the complaint as they relate to the prior decision. The District Court did or should have assumed the truth of the allegations for purposes of the decision. Therefore, proof of the facts was not necessary. Necessarily, the decision was made prior to Plaintiff/Appellant having had a full opportunity to present its evidence at trial.

3. *Issues that Could Have Been Raised.*

Defendants/Appellees further contend that **res judicata** bars consideration of issues which "could have been raised but were not litigated in the prior action."

With respect to the question of whether the issue of liability as alleged in the present suits was litigated in the prior suits so as to preclude relitigation in the present suits, it could not refer to those matters raised with respect to the asserted antitrust violations or the alleged violations of the Virgin Islands bidding

statute. The application of the equitable doctrine would be limited to consideration of the issues related to the question of the legality or illegality of the practice and/or policy of awarding exclusive leases for the use of air navigation facilities in the face of the federal prohibition of the practice, which is an issue under consideration in the present suits. Since the District Court in the prior case limited its determination of the question to citing the power under the Virgin Islands' statute authorizing the Port Authority to "lease property", its conclusion that such therefore permitted "exclusive" leasing was a non-sequitur. See *Sea Air Shuttle Corp. v. The Virgin Islands Port Authority,* 800 F. Supp. 293 at 305. In any event, the fact that the prior suit and the present suits involve "essentially the same course of wrongful conduct is not decisive, *Lawlor,* supra, at 327.

4. *Restatement (Second) of Judgments, Exceptions.*

In several places in their briefs, Defendants/Appellees stress the principles expressed in the *Restatement, (Second) of Judgments.* However, in the exposition of their position that the issue preclusion rule absolutely precludes raising of an issue disposed of by a prior decision, they do not explain why none of the exceptions in Section 28 of *Restatement, (Second) of Judgments* would not be applicable in the present cases.

Exceptions include when the matter is a question of law and a new determination would avoid inequitable administration of the law, (Section 28(2)); when there are differences in the quality or extensiveness of the proceedings (Section 28(3)); when there is a clear and convincing need for a new determination of the issue because of the potential adverse impact on the public interest, (Section 28(5)(a)) or; when the party sought to be precluded, as a result of the conduct of his adversary or other

special circumstances, did not have an adequate opportunity to obtain a full and fair adjudication in the initial action, (Section 28(5)(c). These elements are present in the present cases.

a) **Inequitable Administration of the Law.** The question of whether the granting of exclusive use contracts for the use of air navigation facilities when an airport authority has obtained federal funds for the construction of its facilities violates federal law or whether, in addition, in the implementation of the policy or practice prohibited by federal law, the authority improperly relied on matters that are the exclusive concern of federal law, are questions of law. If, further, the prior court characterized the conduct of the authority as exclusive leasing authorized by local and federal law merely because the local statute authorized leasing and, therefore, is the authorized exercise of a proprietary right, it conflicts directly with previously settled law determining the practice to be illegal, *Niswonger v. American Aviation, Inc.*, 411 F.Supp. 769 (1975), and a substantial question of the inequitable administration of the law exists.

b) **Difference in the quality of the Proceeding.** The challenge to the conduct of the public authority in the prior suit was carried out within the context of a challenge to the selection process by means of which another bidder was selected and, as a consequence, Sea Air was not selected. The suit filed was originally to question various aspects of the selection process within the context of the existing procedure and under the antitrust laws and to seek an exclusive use contract for Sea Air. The issue of the damages caused by prohibition of the policy and practice of granting exclusive leases was raised by a request for amendment in the present suits which was denied by the court below. The present suit involves a direct challenge to the practice as prohibited by federal law and a request for damages

in which the question of the legality of the policy and practice is a predicate consideration. Under these circumstances, the difference in the quality of the proceedings is substantial.

c) **Potential Adverse Impact on Public Interest.** The question of the continuation of the challenged policy and practice in spite of the federal prohibition generates unquestionably, on its face, a matter of potential adverse impact on the public interest prohibiting exclusive leases at federally funded airports is fundamental to the economic underpinnings of the federal aviation program as embodied in the federal policy, clearly calling for a new determination.

d) **Full and Fair Opportunity to Litigate.** In the exposition of the justification for the exceptions to the application of issue preclusion in *Restatement (Second) of Judgments,* Section 28, subsection 5(c), lack of a full and fair opportunity to litigate the prior action in the case below is cited and reference is made to situations in comment (i) in which "one party may conceal from the other information that would materially affect the outcome of the case." Plaintiff/Appellant asserted below and in the prior case strongly the argument that the defendant Port Authority had concealed the information regarding the use of federal grant monies. Whether or not it was deliberately concealed or overlooked, its existence was recognized and it had not been previously revealed and could very well have significantly affected the outcome of the prior suit, except for the denial of the court to allow its consideration. When the information came to light and the amendments to the complaint were requested, the court, without fact-finding, concluded that the belated amendments were filed in bad faith and were dilatory, and denied the amendments in part because discovery would be necessary, etc. In view of these considerations, it could hardly

be said that there was a full and fair opportunity to litigate in the prior case this issue as it relates to the present claims.

e) **Proof of Different Facts.** Defendants/Appellants contend that the need for proof of different facts in the second action does not determine whether the second action is precluded, citing *Restatement (Second) of Judgments,* Section 25.

The section cited refers to proof of facts in successive actions to support "the same ground." In the present case, the cause of action is different and the argument as to the requirement of proof of different facts (i.e. proof of damages arising after the decision in the prior case) is illustrative of the difference in the ground for the relief which should have precluded the application of **res judicata**, as supported by the cases cited in the principal brief.

f) **Application in Civil Rights Cases.** Defendants/Appellants find difficulty with the expressions to the effect that **res judicata** should be used sparingly in civil rights cases. The entire history of the very existence of federal civil rights laws arises out of the need to provide a separate alternative means of obtaining justice in the face of adverse state action. State action is a necessary predicate for a federal civil rights suit. However, Defendants/Appellants overlook that both of the cases cited by Plaintiff/Appellant were cited for and support the proposition that the spare use of the doctrine would apply when there was no prior decision "terminating in final judgment on the merits." In the prior case relied upon by the District Court for the application of the preclusive doctrine, there was no final judgment on the merits concerning the question of the right to compensation for the damages caused as a consequence of the denial of access to the air navigation facilities.

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5. *Change of Remedy/Unitary Claim.*

Defendants/Appellants further argue that "merely by changing the remedy he seeks" Plaintiff/Appellant cannot avoid the application of the doctrine. However, their position is predicated on comment "f" of Section 25 of the *Restatement (Second) of Judgments* which refers to a "unitary claim". In the present case, the events which give rise to the cause of action did not occur until after the decision in the prior suit and therefore, the cited principle does not apply to the present cases.

6. *Effect of Erroneous Prior Decision.*

Defendants/Appellants assert that the fact that the prior decision was erroneous does not bar the application of res **judicata**. By itself, it does not. However, since the doctrine is an equitable doctrine, it should not be used if it would perpetuate an injustice. A court should not apply it if the court in the prior case relied upon for the application of the doctrine, did err in its application of the law and the subsequent case involves a different cause of action.

7. *Facts in the Record Below.*

Defendants/Appellants argue that the principles of equity should not be considered because the facts expressed in the Plaintiff/Appellant's brief are not found in the record below. The factual elements referred to are that Sea Air made a considerable investment, (See Appendix A, page 26, paragraph 47 to page 27, paragraph 49 and Appendix, Volume B, Part I, page 25 to 26, paragraph 78 and page 30, paragraph 92.) that it has been driven out of business, (See, inter alia, Appendix, Volume B, Part I, page 34, paragraphs 108 through 120.) and that the

decision was made while Sea Air was operating at other airports belonging to the Virgin Islands Port Authority (See Appendix, Volume A, pages 53, paragraph 135 and page 131, second paragraph).

8. *Correctness of the Application of the Doctrine.*

Defendants/Appellees' arguments as to the correctness of the District Court's application of the doctrine of **res judicata** are predicated on the assumption that the causes of action in present suits are the same as that presented in the prior suit or are causes of action that could have been raised in the prior suit. In this respect the law cited in support of the position is appropriate. However, it is the fact that the causes of action in the present suits arise from events occurring after the decision in the prior suit that renders the arguments and the law cited inapplicable to the present suits.

9. *Alternative Bases.*

Defendants/Appellees argue there are alternative bases for the dismissal of the present suit. These arguments should be considered in the light of the principle that the dismissal on **res judicata** grounds is fundamentally a dismissal based on the allegations which should be presumed true for these purposes. The alternative grounds suggested by Defendants/Appellees (compliance with Rule 23.1 of the FRCP and lack of a private right of enforcement under the federal aviation laws) would also be predicated on the allegations, therefore, the same presumption should apply and to the extent they would rely on a dismissal predicated on a motion for summary judgment, every presumption in favor of the party against which the remedy is requested should be made. Therefore, the allegations that a duly

certified air carrier in which substantial sums were expended was driven out of business by the denial of access to the air navigation facilities in question should be taken as true. With respect to liability, there remains only the question of law as to the legality of the conduct of the state officials responsible for the denial.

10. *Rule 23.1 Compliance.*

Defendants/Appellees assert that Plaintiff/Appellant failed to satisfy the prerequisites of FRCP 23.1 for a stockholder derivative suit. With respect to this argument, the required specific allegations, with particularity, are found in the Appendix, Volume A at pages 17 through 21, paragraphs 23 to 30 and Appendix, Volume B, Part I, pages 15 to 17, paragraphs 40 through 45. See also Appendix, Volume A, pages 144 through 148. In addition, the matter was rendered academic by the appearance of Sea Air in support of the Plaintiff/Appellant's suits. See Docket entry 49 on page 8 of Appendix, Volume A, and Docket entry 24, Appendix, Volume B, Part I, page 3.

11. *Federal Aviation Act Question.*

Defendants/Appellees argue further that the present suits, in substance, are suits that arise from the alleged violations of the Federal Aviation Act and that there is no private right of action under said statute, referring to Sections 1305 and 1349 of 49 USC. It is true that Section 1305 does not, by its terms, convey property rights and that there is no private right of action to enforce the regulatory scheme under the Federal Aviation Act. It is equally true that the Federal Aviation Act does not, by its terms, deprive a private citizen of property rights otherwise acquired in the normal course of business and otherwise protected

by the Constitution, *O'Connell Management Company v. Massachusetts Port Authority,* 744 F. Supp. 368 (D.Mass. 1990). State law determines whether such a property interest exists, *Brown v. Trench,* 787 F.2d 167, (3rd Cir. 1986). Defendants/ Appellees position is tantamount to saying that because there is a federal regulatory scheme which limits the exercise of proprietary powers of a state agency and gives the exclusive authority to the federal government to enforce its provisions, a state agency can damage the property interests of a private citizen in violation of the federal regulatory scheme with impunity and the private citizen has no remedy under those provisions of the Constitution that otherwise protect the property rights of private citizens. It is the equivalent to saying that because the state has the exclusive jurisdiction for the enforcement of the criminal statutes against a violator, a private citizen has no remedy otherwise to recover damages arising from the criminal act. Any regulatory scheme that would have such an effect would be clearly unconstitutional and contravene the doctrine set down in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 29 L. Ed 2d 619, 91 S. Ct. 1991 (1971) which held that:

> "Where legal rights have been involved, and a federal statute provides for a general right to sue for such invasion, federal court may use any available remedy to make good the wrong done."

42 U.S.C. Section 1983 and 28 U.S.C. Section 1331 provide for such a general right to sue and those statutes have been employed here by Plaintiff.

Appendix L

12. *The Award of Attorneys' Fees.*

Finally, Defendants/Appellees assert that Plaintiff/Appellant waived the right to question the award of attorneys fees for not opposing the motion. The reason for this is that, at the time the motions were filed and the order was entered, the attorney representing Plaintiff/Appellant had withdrawn, the withdrawal had not been approved, Plaintiff/Appellant's motion to appear **pro se** had been denied and he was not able to obtain the services of alternate counsel to appear in his representation. See Docket 52 in the Appendix, Volume A, page 8 and Volume B, Part I, Docket entries 27, 28 and 29.

Of course, the reversal of the dismissal on **res judicata** grounds should bring with it the reversal of the award of attorneys fees independently of whether the motion was opposed. Independently considered, the bare assertions of the Defendants/Appellees as to the lack of substance of the claims is belied by the fact that the actions raised in both the present suits and the prior suit have been dismissed on technical grounds and there is no question but that the events complained of occurred in the manner alleged by the claimant. There is nothing the least bit frivolous about a private citizen attempting to recover damages suffered as a result of conduct of a state agency which contravenes federal law and violated constitutionally protected property rights.

I hereby certify that on this date two true and exact copies each of the Plaintiff/Appellant's Consolidated Reply Brief were sent by first class prepaid United States mail to the following parties:

Appendix L

FREDERICK G. WATTS, ESQ.
WATTS & STREIBICH
P.O. BOX 11720
ST. THOMAS, V.I. 00801

OFFICE OF THE
ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
48B & 50C
KRONPRINDSENS GADE
ST. THOMAS, V.I. 00802

I FURTHER CERTIFY, that on this date one true and exact copy of the Plaintiff/Appellant's Consolidated Reply Brief was also sent by first class prepaid United States mail to the following address: CLERK OF THE COURT, FEDERAL COURTHOUSE, 5500 VETERANS DRIVE CHARLOTTE AMALIE, ST. THOMAS, USVI 00802-6424

Respectfully submitted, this 23rd day of October, 1996.

MARTINEZ-ALVAREZ, MENENDEZ CORTADA
& LEFRANC ROMERO PSC
Avenida Ponce de Leon 701, Suite 407
Miramar, Santurce, Puerto Rico 00907

Por: s/ Lawrence E. Duffy
LAWRENCE E. DUFFY
USDC No: 122304
Tel: 721-1140

APPENDIX M — LETTER DATED FEBRUARY 26, 1993 FROM U.S. DEPARTMENT OF TRANSPORTATION TO LEWIS HUCK

U.S. Department
of Transportation

800 Independence Ave., S.W.
Washington, D.C. 20591

Federal Aviation
Administration

FEB 26, 1993

Mr. Lewis F. Huck
15084 Kimberly Lane
Houston, Texas 77079

Dear Mr. Huck:

Per your letter of February 16, 1993, we have enclosed a list of projects which have been funded under the Airport Improvement Program at the airports in the Virgin Islands, which are sponsored by the Virgin Islands Port Authority. This grant program began in 1982 and still continues at this date.

Each project listing includes a brief description of the work funded and the amount of Federal funds.

Sincerely,

s/ Stan Lou
Stan Lou
Manager, Programming Branch

Enclosure

RUN DATE: 02/23/93 RUN TIME: 13:41:14

State of Virgin Islands All Phases Page: 1

City / Grant MO	Airport Name	Work Description	Disc. Funds	Entit. Funds	Federal Funds (AIP)
Charlotte Amalie 01 82	Cyril E King	Construct Taxiway, Aprons and Access Road; Construct Terminal Building (Phase 1); Install Public Utilities; Improve Drainage	4,483,651	1,029,540	5,513,191
02 83		Construct Runway, Taxiway and Apron; Install Airport; Lighting; Improve Drainage	5,859,805	1,223,114	7,082,919

03	84	Relocate Utility	1,123,177	1,524,170	2,647,347
04	85	Construct Runway, Taxiways and Apron; Install Taxiway Lighting	0	2,772,075	2,772,075
05	86	Rehabilitate & Groove Runway	23,892	382,500	406.392
06	86	Construct Runway, Taxiways, Apron and Access Road; Expand Apron Improve Drainge	4,484,966	4,080,734	8,565,700
07	87	Acquire Aircraft Rescue and Fire Fighting Vehicles	187,574	317,620	505,194

08	88	Conduct Master Plan Update; Construct Access Roads	0	396,000	396,000
09	88	Construct Apron and Terminal Bldg. (Phase 1)	3,905,961	4,186,000	8,091,961
10	89	Reconstruct Security Gate; Construct Aprons; Expand Apron; Construct Access Road; Improve Drainage	2,839,321	0	2,839,321

RUN DATE: 02/23/93 RUN TIME: 13:41:25

State of Virgin Islands All Phases Page: 2

City / Grant MO	Airport Name	Work Description	Disc. Funds	Entit. Funds	Federal Funds (AIP)
Charlotte Amalie 11 90	Cyril E King	Construct Taxiway and Access Rd.	5,000,000	889,000	5,889,000
12 91		Construct and Light Runway and Taxiways; Realign and Light Taxiway; Construct Apron	5,000,000	1,658,684	6,658,684
13 92		Construct and Light Runway (Phase II); Overlay Taxiway Construct Access Rd.	6,000,000	1,737,187	7,737,187

14	92		Install Security System	254,000	302,518	556,518
15	93		Acquire Power Sweeper	0	85,500	85,500
			Site Total	39,162,347	20,584,642	59,746,989
Christiansted St Croix		Alexander Hamilton	Conduct Noise Compatibility Plan Study (Part 150)	0	41,400	41,400
02	85					
03	87		Acquire Aircraft Rescue and Fire-fighting Vehicles; Install Runway and Taxiway Lighting; Install Electrical Generator	0	1,150,182	1,150,182

04	88	Construct Runway Safety Area; Relocate Visual Approach Aid	0	2,298,079	2,298,079
05	89	Overlay Taxiway	0	1,270,125	1,270,125
06	90	Expand Apron (Design Only); Acquire Land for Approaches	0	1,539,000	1,539,000
07	91	Conduct Master Plan Update	0	144,900	144,900

RUN DATE: 02/23/93 RUN TIME: 13:41:34

State of Virgin Islands All Phases Page: 3

City / Grant MO	Airport Name	Work Description	Disc. Funds	Entit. Funds	Federal Funds (AIP)
Christiansted St Croix 08 92	Alexander Hamilton	Install Security System; Reconstruct and Seal Coat Apron (Phase I)	253,000	756,788	1,009,788
09 93		Acquire Power Sweeper	0	85,500	85,500
		Site Total	253,000	7,285,974	7,538,974
		State Total	39,415,347	27,870,616	67,285,963

APPENDIX N — NEWSPAPER ARTICLE DATED JUNE 8, 1994

Virgin Islands **The Daily News, Wednesday, June 8, 1994**

Seaplane search starts over

ST. CROIX — Inter-island seaplane service is back to square one.

The V.I. Port Authority announced Tuesday that it has terminated its contract with Caribbean Airboats Inc.

"It is anticipated that a new request for proposals will be drafted and disseminated throughout the industry so that a new seaplane operation can be chosen to resume inter-island seaplane service," Authority Executive Director Gordon Finch said in a Tuesday afternoon written statement.

The territory has had no Christiansted-Charlotte Amalie seaplane service since Hurricane Hugo destroyed terminals in both cities and much of the V.I. Seaplane Shuttle airline's fleet of Grumman Mallards in 1989.

Finch said that under its contract, Caribbean Airboats was to take over control of — and begin paying rent on — the seaplane terminals in Christiansted and Charlotte Amalie on Feb. 1 and begin inter-island service by May 1.

When service did not begin and rent was not paid, Finch said, Caribbean Airboats was notified that the contract would be terminated June 2.

Fred Berkobin, Caribbean Airboats president, was in Pennsylvania on Tuesday and could not be reached for comment.

Appendix N

Berkobin, however, has disputed the Port Authority's claim that the Christiansted terminal was ready for use in February.

In fact, he has maintained that because he has not received a certificate from the Department of Planning and Natural Resources showing that the site is environmentally safe, Caribbean Airboats has not been able to begin its own renovations at the Christiansted terminal.

Finch said Tuesday that although the Port Authority is obligated to provide the certificate, it "was not, nor has it ever been, a requirement prior to the commencement of operations."

The Port Authority awarded exclusive use of the terminals to Caribbean Airboats on Nov. 20, 1990, but they have remained vacant.

First, Sea Air Shuttle Corp. — another bidder on the contract — challenged Caribbean Airboats' exclusive right to use the terminals. In March 1992, a federal judge dismissed the suit.

In February 1993, work crews found that the underground fuel tanks at the Christiansted terminal contaminated the soil there.

The cleanup stretched until last summer. Then the ramp at the site had to be reconstructed.

Port Authority officials agreed that the site was ready for occupancy Feb. 1 and started counting the 90 days the contract allowed for Caribbean Airboats to begin operations.